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49 CFR Part 39

Transportation for Individuals With Disabilities: Passenger Vessels; Final Rule

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 39

[Docket OST–2007–26829]

RIN 2105–AB87

Transportation for Individuals With Disabilities: Passenger Vessels

AGENCY: Office of the Secretary, Department of Transportation.

ACTION: Final rule; request for comments.

SUMMARY: The Department is issuing a new Americans with Disabilities Act (ADA) rule to ensure nondiscrimination on the basis of disability by passenger vessel operators (PVOs). This rulemaking concerns service and policy issues. Issues concerning physical accessibility standards will be addressed at a later time, in conjunction with proposed passenger vessel accessibility guidelines drafted by the United States Access Board. The Department is also seeking further comment on three issues, concerning emotional support animals, mobility aids, and the relationship of DOT and DOJ rules.

DATES: This rule is effective November 3, 2010. Comments should be received by October 4, 2010.

ADDRESSES: You may submit comments (identified by the agency name and DOT Docket ID Number OST–2007–26829) by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Instructions: You must include the agency name (Office of the Secretary, DOT) and Docket number (OST–2009–) for this notice at the beginning of your comments. You should submit two copies of your comments if you submit them by mail or courier. Note that all comments received will be posted without change to *http://www.regulations.gov* including any personal information provided and will be available to Internet users. You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit *http://DocketsInfo.dot.gov.*

Docket: For Internet access to the docket to read background documents and comments received, go to *http://www.regulations.gov.* Background documents and comments received may also be viewed at the U.S. Department of Transportation, 1200 New Jersey Ave., SE., Docket Operations, M–30, West Building Ground Floor, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 1200 New Jersey Avenue, SE., Room W94–302, Washington, DC 20590. (202) 366–9310 (voice); (202) 366–7687 (TDD); *bob.ashby@dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION: The Department of Transportation has issued rules concerning nondiscrimination on the basis of disability for almost every mode of passenger transportation, including public transportation (bus, subway, commuter rail), over-the-road buses, intercity rail, and air transportation. The only mode for which the Department has yet to issue rules is transportation by passenger vessels. With this final rule, the Department can begin to close this gap in coverage of transportation for individuals with disabilities.

Background

When the Department issued its first Americans with Disabilities Act (ADA) rules in 1991, we discussed the coverage of passenger vessels. The Department reserved action on passenger vessels in the regulatory text in the final rule, and made the following statements on the subject in the preamble (56 FR 45599–45560; September 6, 1991):

> Ferries and passenger vessels operated by public entities are covered by the ADA, and subject at this time to DOJ Title II requirements as well as § 37.5 of this Part. * * * We anticipate further rulemaking to create appropriate requirements for passenger vessels * * *. The reason for this action is that, at the present time, the Department lacks sufficient information to determine what are reasonable accessibility requirements for various kinds of passenger vessels. * * * The Department of Transportation anticipates working with the Access Board and DOJ on further rulemaking to define requirements for passenger vessels. * * * The Department does want to make clear its view that the ADA does cover passenger vessels, including ferries, excursion vessels, sightseeing vessels, floating restaurants, cruise ships, and others. Cruise ships are a particularly interesting example of vessels subject to ADA coverage.
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> Cruise ships are a unique mode of transportation. Cruise ships are self-contained floating communities. In addition to transporting passengers, cruise ships house, feed, and entertain passengers and thus take on aspects of public accommodations. Therefore cruise ships appear to be a hybrid of a transportation service and a public accommodation * * *
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> In addition to being public accommodations, cruise ships clearly are within the scope of a "specified public transportation service." The ADA prohibits discrimination in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce (§ 304(a)). "Specified public transportation" is defined by § 301(10) as "transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis."
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> Cruise ships easily meet the definition of "specified public transportation." Cruise ships are used almost exclusively for transporting passengers and no one doubts that their operations affect commerce. Cruise ships operate according to set schedules or for charter and their services are offered to the general public. Finally, despite some seasonal variations, their services are offered on a regular and continuing basis.
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> Virtually all cruise ships serving U.S. ports are foreign-flag vessels. International law clearly allows the U.S. to exercise jurisdiction over foreign-flag vessels while they are in U.S. ports, subject to treaty obligations. A State has complete sovereignty over its internal waters, including ports. Therefore, once a commercial ship voluntarily enters a port, it becomes subject to the jurisdiction of the coastal State. In addition, a State may condition the entry of a foreign ship into its internal waters or ports on compliance with its laws and regulations. The United States thus appears to have jurisdiction to apply ADA requirements to foreign-flag cruise ships that call in U.S. ports.

The U.S. Supreme Court affirmed the Department's long-held view that the ADA covers passenger vessels, specifically including foreign-flag cruise ships. In *Spector et al.* v. *Norwegian Cruise Lines,* 545 U.S. 119 (2005), the Court held that cruise ships are "public accommodations" that provide "specified public transportation" within the meaning of the ADA. The Court said that, while there may be some limitations on the coverage of the ADA to matters purely concerning the internal affairs of a foreign-flag vessel, matters concerning the ship operators' policies and conditions relating to transportation of passengers with disabilities (*e.g.,* higher fares or surcharges for disabled passengers,

waivers of medical liability, requirements for attendants) had nothing to do with a ship's internal affairs. Such matters, then, are clearly subject to ADA jurisdiction. It is issues of this kind that are the focus of this final rule.

The Access Board has been working for some time on drafting accessibility guidelines for passenger vessels. On November 26, 2004, the Access Board published for comment a notice of availability of draft guidelines for larger passenger vessels with a capacity of over 150 passengers or overnight accommodations for over 49 passengers. Since that time, the Access Board has been reviewing comments received and planning work on a Regulatory Assessment for vessel guidelines. On July 7, 2006, the Access Board issued a second notice of availability asking for comments on a revised draft of vessel guidelines. Following the review of comments on that notice, the Access Board, in cooperation with the Department of Transportation, would issue an NPRM and Regulatory Assessment concerning physical accessibility requirements for larger passenger vessels. As envisioned, the final rule resulting from such a future NPRM would ultimately be joined with a final rule resulting from this final rule in a single, comprehensive passenger vessel ADA rule.

On November 29, 2004, the Department published an advance notice of proposed rulemaking (ANPRM) asking questions about the shape of future ADA requirements for passenger vessels (69 FR 69247). The Department received 43 comments to the ANPRM. Most of these comments concerned the Access Board's draft guidelines and physical accessibility issues relating to existing and new vessels, and some of them concerned physical accessibility issues specific to very small vessels. The Department is retaining these comments and will consider them in context of the continuing work on the Access Board's draft vessel guidelines and the future NPRM that would propose to incorporate those guidelines in DOT rules.

The only comment on the ANPRM that concerned issues included in this NPRM was from the International Council of Cruise Lines (ICCL), a trade association for entities in the cruise industry. ICCL recommended that the rules exempt transfers of persons from larger vessels to tenders; recognize the flexibility of cabin configurations; exclude from coverage shore excursions provided by third-party-vendors, particularly in foreign countries; have eligibility criteria and direct threat provisions that allow operators to establish policies that will avoid safety risks; permit requirements for personal attendants; and permit limitations on the transportation of service animals. The Department addressed these comments in context of the individual sections of the proposed rule.

The notice of proposed rulemaking (NPRM) for this rule was issued on January 23, 2007 (72 FR 2833). In response to the NPRM, hundreds of comments were received from disability advocacy groups, the regulated industry, other governmental agencies, and the general public. At the request of industry, the Department held a public meeting on April 8–9, 2008, where members of these groups attended to inform the Department of their views on the practical effect of the NPRM's provisions. This final rule addresses the comments received in the docket and at the public meeting.

Section-by-Section Analysis

Section 39.1 What is the purpose of this Part?

This section briefly states the nondiscrimination-related purposes of the rule and specifies that nondiscrimination requirements apply to operators of foreign-flag as well as U.S. vessels.

Section 39.3 What do the terms in this rule mean?

This section defines the terms used in this rule. Many of the definitions are based on parallel definitions in other disability nondiscrimination regulations, adapted to the passenger vessel context. This preamble discussion focuses on terms that are specific to the passenger vessel context. Other terms have the same meanings as they do in other DOT disability rules.

Because this rule does not propose physical accessibility requirements for vessels, the definition of "accessible" will be fleshed out with proposed standards based on Access Board guidelines in a future rulemaking. The definitions of "auxiliary aids and services" and "direct threat" are drawn from Department of Justice regulations. "Direct threat" concerns only threats to the health and safety *of others.* Something that may threaten only the health or safety of a passenger with a disability, himself or herself, by definition cannot be a direct threat. The definition of "direct threat" is consistent with the understanding of that term in DOT and DOJ regulations. In the preamble to its over-the-road bus ADA rulemaking, the Department provided a thorough discussion of this concept (63 FR 51671–51674), which remains a good guide to the Department's thinking on this issue.

The definition of "disability" is taken from the existing ADA rule, 49 CFR Part 37. The Department is well aware that the ADA Amendments Act of 2008 altered the definition of disability. However, in its pending ADA Title II and Title III regulations, DOJ has not modified its existing definitions of this term, though it expects to do so In the future. The Department believes that it would be best to work on the regulatory expression of the amended definition in concert with DOJ, resulting in a single government-wide regulatory definition. Typically, in DOT transportation nondiscrimination practice (in contrast, for example, to employment nondiscrimination matters), the definition of "disability" has not been a major issue. In implementing this rule, the Department will be informed by the 2008 legislation if any issues arise in which the changed language of the statute are relevant to the obligations of PVOs.

The term "disability" means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment. A commenter expressed concern that passengers may have many different kinds of disabilities and said that the proposed rule does not clearly define "disability." Another commenter stated that the definition of "disability" is unnecessarily confusing since it allows people who are "misclassified as disabled" to be considered disabled for the purposes of this rule.

The definition of the term "disability" in this rulemaking is based on the ADA statutory definition of "disability," and longstanding DOT and DOJ regulatory definitions. People who are "regarded as" having a disability, even if in fact they don't, have always been a protected class under the ADA. It is certainly true that there are many kinds of disabilities, and the definition, as fitting in a civil rights mandate, is intentionally broad.

The definition of "facilities" is also consistent with the definition of this term in other DOJ and DOT rules. Examples of facilities in the passenger vessel context include such things landside facilities and floating docks that a vessel operator owns, leases, or controls in the U.S. (including its territories, possessions, and commonwealths). Comments received in relation to the definition of facilities and terminals from the cruise line

industry objected to applying this rulemaking to facilities outside the U.S. due to possible conflict with the laws of the host nation. As in the case of the Air Carrier Access Act, where the Department does not assert jurisdiction over airports in foreign countries, the Department does not in this rule attempt to cover port facilities abroad. A passenger vessel operator (PVO) would be viewed as controlling a facility, even if it did not own or lease it, if the facility owner, through a contract or other arrangement, delegated authority over use of the facility to the passenger vessel operator during those times in which the vessel was at the facility.

The Department realizes that entities other than PVOs, such as municipalities or other private businesses, may own, lease, or control U.S. landside facilities that passenger vessels use. The obligations of these entities would be controlled by Titles II and III of the ADA and, in some cases, by section 504 of the Rehabilitation Act of 1973. The relationship envisioned between the facility owner/controller and the PVO is analogous to other situations in which entities subject to different disability access rules share responsibility (*e.g.,* public entity landlord subject to Title II leases property to a private entity subject to Title III).

The definition of "historic vessel" is also one that is likely to become more significant when future rulemakings include physical accessibility standards to Part 39. "New," "existing," and "used" passenger vessel are also terms that will be of greater importance once physical accessibility standards are in place. Because they are not necessary in this regulation, the Department has deleted these definitions. We anticipate proposing definitions of these and other terms relevant to the application of physical accessibility standards in a subsequent rulemaking related to Access Board proposals for passenger vessel guidelines.

"Operates" means the provision of transportation by any public or private entity on a passenger vessel. Moreover, the definition also includes the provision of transportation by another party having a contractual or other arrangement or relationship with the PVO involved. As in other parts of the Department's accessibility rules, a party can contract out its functions, but cannot contract away its responsibilities.

"Passenger vessel" is meant to be a broadly encompassing term for any boat, ship, or other craft that is hired by members of the public or for other activities conducted as a part of the vessel operator's normal operations (which could include promotional activities such as the use of a vessel by members of the public for which a fare is not charged or free ferry service). Boats or other craft that are rented or leased to consumers to be operated by the consumer (versus by the passenger vessel operator and its personnel) are not covered.

One commenter recommended excluding vessels that support offshore oil and gas activities from this definition. Such vessels are chartered by a customer principally for transport of cargo. Other commenters recommended excluding from the rulemaking supply vessels, crew boats, all vessels below a certain size (*e.g.,* 100 gross tons, space for 150 or 6 passengers) school training or sailing vessels, party fishing vessels, and research vessels carrying students if the "mission" of the vessel would be compromised.

It appears that many of these comments were based on the premise that this rule will require significant physical changes to existing vessels. It will not. This rule addresses policies and practices of PVOs, not the design or construction of their vessels. With respect to PVO policies that would, for example, exclude an individual because he is blind, or charge extra fees because a passenger uses a wheelchair or other assistive device, the nondiscrimination principles of the ADA do not apply any differently because of the size or function of a vessel. As it develops its vessel accessibility guidelines, the Access Board is taking vessel size matters into account, and in future rulemaking the Department anticipates harmonizing its standards with the Access Board guidelines, including size limitations the Access Board rule may adopt.

The Passenger Vessel Association commented that, where a vessel owner or operator is not paid for carrying the passengers, there should be no additional requirements placed on the owner by the rule. The Department disagrees. The rights of individuals with disabilities are protected under the ADA whether or not the individual is a paying customer. There is no basis under the statute for treating individuals differently based on their status as paying or non-paying passengers.

"Passenger vessel operator" is a term that includes both owners and operators of a passenger vessel. A PVO may be either a public or a private entity. Sometimes, ownership of vessels can be complex, with two or more parties involved, with yet another party responsible for the day-to-day operation of the vessel. In such situations, all the parties involved would be jointly and severally responsible for compliance with these rules.

In a change from the NPRM, the term PVO includes only private entities primarily engaged in the business of transporting people. The Department of Justice (DOJ) has authority over public accommodations that operate vessels and are not primarily engaged in the business of transporting people. DOJ's regulations applicable to public accommodations apply to ensure nondiscrimination by such vessel operators. Persons with complaints or concerns about discrimination on the basis of disability by vessel operators who are private entities not primarily engaged in the business of transporting people, or questions about how DOJ's regulations apply to such operators and vessels, should contact DOJ. For these reasons, it has been determined that it is not necessary to include provisions in this final rule concerning vessels operated by private entities not primarily engaged in the business of transporting people.

The basic distinction is that a vessel operator whose vessel takes passengers from Point A to Point B (*e.g.,* a cruise ship that sails from Miami to one or more Caribbean islands, a private ferry boat between two points on either side of a river, a water taxi between two points in an urban area) is most likely a private entity primarily in the business of transporting people. A vessel operator who departs from Point A, takes passengers on a recreational trip, and returns passengers to Point A without ever providing for disembarkation at a Point B (*e.g.,* a dinner or harbor cruise, a fishing charter) is most likely a private entity not primarily engaged in the business of transporting people. In cases where it is not clear whether a vessel operator is or is not primarily engaged in the business of transporting people, the Department of Transportation, in consultation with DOJ, will determine into which category the operator falls. There may be certain situations in which a passenger vessel's operations can simultaneously be subject to both DOT and DOJ rules.

The terms, "individual with a disability" and "qualified individual with a disability," have similar meanings for purposes of the rule. There could be situations in which a qualified individual with a disability may not actually be a passenger, such as in the case of an individual choosing to assist a person with a disability in ways that do not involve actually accompanying the person on a voyage (*e.g.,* assistance with buying tickets, assistance in moving through a terminal, advocating

for the person with the PVO concerning policies affecting the person's travel).

"Specified public transportation" should not be read under this Part to include promotional rides on vessels for the purpose of informing a vessel purchase. Nor does it include operations of vessels by private entities not primarily engaged in the business of transporting people.

"Terminal" refers to property or facilities adjacent to the means of boarding a vessel that passengers use to get to the vessel. A terminal, in this sense, can be a large complex, a building, or a very simple facility. Importantly, terminals are covered under Part 39 only to the extent that the PVO owns or leases the terminal or exercises control over its selection, design, construction, or alteration (*e.g.,* PVO selects site for construction of new facility; PVO has choice of docking at existing accessible or inaccessible facility).

The definition of "wheelchair" is taken from the Department's ADA rule for surface transportation modes, 49 CFR part 37. The only difference is that the part 39 definition does not include a sentence referring to the "common wheelchair" term. This term was taken from Access Board guidelines relating to the design and construction of surface transportation vehicles, and it is not clear that the term has a relevant application in the passenger vessel context. Moreover, the inclusion of the term in part 37 has been problematic, in that it has led to unanticipated operational applications of what was intended to be a design standard.

Section 39.5 To whom do the provisions of this Part apply?

The Department is applying the provisions of this Part to all passenger vessels, regardless of size. There are three major exceptions to this general coverage. First, while all U.S.-flagged vessels would be covered, coverage of foreign-flag vessels would be limited to those that pick up or discharge passengers in the U.S. For example, suppose a foreign-flag cruise PVO operates two ships. One of them sails only among ports in Europe. Another picks up passengers in Miami and cruises to several Caribbean ports. The latter would be covered and the former would not. Several commenters recommended for the rule to apply to all domestic and foreign cruise ships, including river cruise ships, regardless of whether the ships picks up passengers in the U.S. The Cruise Lines International Association, Inc. disagreed, and commented that the rules should not cover foreign flag cruise ships that do not embark, disembark, or stop at any U.S. ports because Congress has not made a "clear statement" of intent that the ADA apply extraterritorially. This rule covers only those vessels that pick up or discharge passengers in the U.S.

The second exception will address vessel accessibility standards. To this end, this rule reserves paragraph (c) to state the scope of the applicability of these standards in the future. As noted above, some comments urged exempting small vessels from the rules due to the difficulty in making physical modifications to such vessels. The Department notes that draft Access Board vessel guidelines would limit their application to vessels permitted to carry over 150 passengers or over 49 overnight passenger capacity categories, as well as tenders with a capacity of 60 or more and all ferries. The Department would follow the Access Board's final guidelines, when they are issued, with respect to coverage.

While exemptions or scoping provisions based on vessel size might be appropriate for accessibility standards, the Department believes that there is no basis by which to justify an exemption from the nondiscrimination provisions not related to such standards. The provisions of this rule are do not require physical changes to a vessel, but rather concern an operator's policies to ensure treatment for disabled passengers that is consistent with the intent of the ADA.

The third exception, as noted above, is that the rule will apply only to private entities primarily engaged in the business of transporting people, and not to private entities not primarily engaged in the business of transporting people. This change eliminates from coverage the vast majority of small private entities to which the NPRM would have applied.

Section 39.7 What other authorities concerning nondiscrimination on the basis of disability apply to owners and operators of passenger vessels?

This section simply points out that recipients of Federal financial assistance (*e.g.,* some public ferry operators) are, in addition to part 39, subject to section 504 of the Rehabilitation Act and DOT implementing rules. Department of Justice (DOJ) ADA regulations, as applicable, also cover PVOs.

Section 39.9 What may a PVO of a foreign-flag vessel do if it believes that a provision of a foreign nation's law prohibits compliance with a provision of this Part?

Section 39.9, which parallels language in the Department's Air Carrier Access Act (ACAA) rules for foreign carriers, provides a waiver mechanism for situations in which a PVO for a foreign-flag vessel believes that a binding legal requirement of a foreign nation (or of an international agreement) precludes compliance with a requirement of Part 39. This provision concerns binding legal requirements, not guidance or codes of suggested practices. It concerns situations in which such a binding legal requirement actually precludes compliance with a Part 39 provision (*e.g.,* Part 39 says "You must do X," while a binding foreign legal requirement says "You must not do X"), as opposed to a situation where foreign law authorizes a practice that differs from a Part 39 requirement (*e.g.,* Part 39 says "You must do Y," while a foreign law says "You may do Z"). In a situation where the Department grants a waiver, the Department would look to the PVO for a reasonable alternative means of achieving the purpose of the waived provision.

To avoid placing PVOs in a situation in which they potentially would be required to comply with contradictory legal requirements, this rule provides PVOs 90 days from the publication of the final rule to file a waiver request. If the PVO files a waiver request meeting the requirements of this section within that period, it could continue to implement policies that it believes are consistent with the foreign law in question pending the Department's decision on the waiver request.

A commenter suggested that an international governing body could be set up to mediate issues of conflict between foreign law and U.S. law. The same commenter recommended that such a governing body could also evaluate a PVO's alternative means of compliance under the standard of "best interest of the person with a disability." At this time, the Department does not believe that the establishment of procedures other than those proposed in the NPRM is appropriate or necessary. These decisions are properly made by the Department as part of its ADA responsibilities. The parallel provisions under the Air Carrier Access Act have worked well with respect to international air carriers.

Proposed section 39.11, concerning equivalent facilitation, has been reserved since it relates mainly to future standards based on the Access Board's vessel design and construction guidelines, which have not yet been formally proposed or adopted by the Access Board. The Department anticipates proposing such a provision in a subsequent NPRM to adopt Access Board guidelines.

Section 39.13 When must PVOs comply with the provisions of this Part?

As a general matter, PVOs would have to begin to comply with the provisions of this rule as soon as the rule becomes effective. There is no evident reason why PVOs should need a lengthy phase-in period to comply with requirements pertaining to denials of transportation on the basis of disability, extra or special charges, attendants, advance notice, waivers of liability, *etc.* Indeed, a significant number of PVO commenters said that their practices and policies are already consistent with the requirements the Department is making part of this rule.

Comments were received urging a range of options from requiring immediate compliance with the rule to delaying the rule until it can be issued with the Access Board's final standards and so that training can be conducted for implementing the rule. As the final rule does not include training requirements and no vessel modifications are required as a result of this rule, the Department believes that simply defining nondiscrimination policies under the ADA does not require any lead time for implementation.

Section 39.21 What is the general nondiscrimination requirement of this Part?

The provisions of this section are parallel to the general nondiscrimination requirements in the Department's other disability-related rules. We call attention particularly to paragraph (b), which would require reasonable modification of PVOs' otherwise acceptable general policies where doing so is necessary to accommodate the needs of a particular individual or category of individuals with a disability. Such modification is required unless it would require a fundamental alteration in the nature of the PVO's services, facilities, *etc.* The final rule modifies the NPRM's language to reflect distinctions between the reasonable modification obligations of public and private entities, consistent with DOJ rules on the subject.

A few commenters stated that the language relating to "reasonable modifications" was not congruent with other Departmental ADA rulemakings and that the requirement to make reasonable modifications exceeds the Department's authority under the ADA. "Reasonable modifications" is a central idea of disability law, occurring in many applications of section 504 of the Rehabilitation Act. A similar provision was adopted in a rulemaking concerning the Air Carrier Access Act, and it has caused no problems of which we are aware. Department of Justice (DOJ) ADA rules have long included the concept. While the Department's surface transportation ADA rule (49 CFR part 37) does not presently include this language, the Department, in a pending rulemaking concerning part 37, has proposed to add it. The Department believes it is appropriate for a PVO to modify policies so that accessible service is actually made available to passengers, absent a alteration. Commenters were unable to provide any examples of how doing so would be inimical to passenger vessel operations or safety.

Section 39.23 What are the requirements concerning contractors to owners and operators of passenger vessels?

As noted above, contractors and other persons whom the PVO uses to provide services to passengers "stand in the shoes" of the PVO with respect to the requirements of this rule. The PVO must ensure, through provisions in the contracts or other agreements with such third parties, that the third parties comply with applicable requirements.

Commenters were concerned with the speed at which contracts must be updated to reflect contractors' duties on behalf of a PVO with respect to the ADA. All contracts must be updated within one year from the effective date of this rule or the contract anniversary date, whichever one comes sooner. The Department believes this amount of time is sufficient for compliance.

Another commenter suggested excluding contractors outside of the U.S. from the requirements of the rule. This final rule does not apply to contractors who work with PVOs outside of the U.S. However, PVOs are encouraged to voluntarily contract for compliance with the ADA to the maximum degree that foreign/international laws will allow.

In reference to paragraph (b), the same commenter suggested that the requirement to include "assurance of compliance" language in contracts should not be applied to contracts between cruise lines and their U.S.-based contractors. The commenter expressed that modifying contracts to add this required language would cause an "undue burden" on cruise lines and would be unnecessary due to existing ADA requirements applicable to U.S.-based contractors. There is no showing in any of the comments that the task of making such a modification to the contract would be a significant barrier at all, let alone an "undue burden." If, as the commenter suggests, the contractors are already in compliance with ADA obligations, the burden on them would be negligible.

Another commenter questioned whether paragraph (b) implicitly requires the creation of a written contract where the PVO and contractor have been operating without such a contract. There is no mandate for a written contract, though good business practices often involve written contracts. However, the absence of a written contract does not excuse noncompliance by a PVO resulting from the action of a third party acting on its behalf. The Department does not need to receive copies of written agreements between a PVO and a contractor.

Section 39.25 May PVOs refuse to provide transportation or use of a passenger vessel on the basis of disability?

The Department views any policy or action prohibiting a person with a disability from being transported on or otherwise using a passenger vessel as discriminatory on its face. If a PVO says to a person, literally or in effect, "you are a person with a disability, therefore stay off my vessel," the PVO would violate this rule.

The Department recognizes that some disabilities may make other passengers uncomfortable. That is not a justifiable reason to deny access to the vessel to persons with these disabilities (*see* paragraph (b)). Only if there is a genuine safety issue, meeting the stringent criteria outlined in section 39.27, would the PVO be justified in excluding a person because the person has a disability. Even in that case, the PVO would have to provide a written or e-mail explanation to the person within 10 days of the denial (paragraph (c)).

Two commenters indicated that historic vessels may not be able to meet the requirements of this section. Another commenter inquired as to whether the section allows the PVO to deny a "wheelchair-bound" passenger access to a second deck where the deck is only accessible by stairs, or from going to a first deck dining space when there is no remaining accessible space in the dining room. The Department recognizes that, particularly for vessels built before the adoption of physical accessibility standards, some vessels will not enable some persons with certain disabilities to travel on or to obtain some services aboard the vessels. For example, an older vessel might not have any overnight cabins of a size that could accommodate a person using a power wheelchair, or might have a dining area that is on a deck that can be accessed only by using steps. The

Department would not, in such a situation, regard a PVO's statement to a passenger about existing physical barriers as equivalent to a policy denying transportation on or use of the vessel on the basis of disability.

Another commenter suggested using a "strict scrutiny" standard for determining whether a vessel's explanation for denying access is reasonable. The "strict scrutiny" legal standard is used for assessing constitutional law issues, and it is not suitable for this situation.

Many of the comments regarding this section ultimately addressed vessel construction and the difficulty involved in handling numerous passengers with mobility aids. This rulemaking imposes no duty on PVOs to make alterations to their vessels to accommodate disabled passengers, beyond existing ADA requirements for Title II (program accessibility) or Title III (readily achievable barrier removal) entities.

As was pointed out by commenters in the public meeting, passenger vessels operate a customer service oriented business that necessitates accommodating passenger requests whenever possible. However, this rule does not call on PVOs to do the physically impossible. For instance, suppose a vessel has entries/corridors that are 30 inches wide and a passenger uses a mobility aid that is 36 inches wide. The passenger is not able to be physically accommodated through those corridors using this device and the PVO would not be in violation of this rule. (Of course, if the passenger chose to use an alternative mobility device that could fit the space, the passenger would have to be provided access using the alternative device.)

Section 39.27 Can a PVO take action to deny transportation or restrict services to a passenger with a disability based on safety concerns?

This section states that a PVO can deny transportation or restrict services to a person with a disability when necessitated by legitimate safety requirements. Legitimate safety requirements cannot be based on mere speculation, stereotypes, or generalizations about individuals with disabilities. They can be based only on actual, demonstrable safety risks. The rule would also permit a PVO to deny or restrict transportation of a passenger with a disability in the event that the passenger posed a direct threat to others. While there is no recordkeeping requirement in the rule, a PVO that claims legitimate safety requirements as the basis for any restriction on a passenger with a disability should be prepared to justify the actual safety basis for its restriction. This would be an important issue in the review of a complaint by the cognizant Federal agency.

Section 39.29 May PVOs limit the numbers of passengers with a disability on a passenger vessel?

The Department views any policy limiting the number of passengers with a disability on a vessel as discriminatory on its face. However, the cruise industry and several PVOs commented that limiting the number of passengers with mobility aids might be necessary based on what a vessel can accommodate either physically or with current staff levels. The Department understands these comments but believes it is necessary to differentiate between disabled individuals with mobility impairments as opposed to persons with other disabilities such as hearing or vision impairments. PVOs do not have any need to limit the number of disabled individuals without a mobility impairment.

However, the Department does recognize that vessel weight and stability requirements may necessarily limit the number of disabled passengers requiring wheelchairs or other powered mobility devices that can safely be physically accommodated on board at any one time. For example, if there are already two individuals on board the vessel using power wheel chairs, and accommodating a third such individual would create weight or stability issues that would threaten the safety of the vessel and persons aboard it, the Captain could deny transportation to the third individual on the basis of a legitimate safety requirement. The Department anticipates that this issue would arise only on relatively small vessels (*e.g.,* a small water taxi), not on larger vessels (*e.g.,* a cruise ship, the Staten Island ferry).

The Department also recognizes that, on some smaller vessels, the physical limitations of the vessel may impose limits on the number of wheelchairs or other mobility devices that can physically fit. This provision is not intended to require, for example, that 10 wheelchairs must be accommodated on a vessel where there is physical space for only four.

Section 39.31 May PVOs limit access to transportation on or use of a vessel on the basis that a passenger has a communicable disease?

Section 39.33 May PVOs require a passenger with a disability to provide a medical certificate?

These related provisions are intended to limit PVOs' discretion to impose requirements or restrictions on passengers on medical grounds. Most disabilities are not medical conditions: A person is not ill because he or she cannot see, hear, or walk, and applying a medical model to many disabilities is inappropriate. On the other hand, people with some communicable diseases may have a disability as the result of their disease and can pose health threats to others on board the vessel.

With respect to communicable diseases, the PVO cannot deny or restrict transportation on or use of a passenger vessel on the basis that the passenger has a communicable disease, unless the PVO acts (1) on the basis of a determination by a public health authority or (2) the PVO is able to make a two-pronged determination. One prong is the severity of the health consequences of a disease; the other is whether the disease can readily be communicated by casual contact. Only if a disease has both severe consequences to the health of other persons *and* is readily communicable by casual contact could a PVO legitimately deny or restrict transportation.

For example, HIV/AIDS has severe health consequences, but is not readily communicable by casual contact. The common cold is readily communicable by casual contact but does not have severe health consequences. Consequently, having a cold or AIDS would not be a basis on which a PVO could limit a person's transportation on or use of a vessel. Probably the best recent example of a disease that meets both criteria is Severe Acute Respiratory Syndrome (SARS), and a readily human-to-human transmissible flu pandemic with severe effects on persons contracting the disease or an outbreak of norovirus would also qualify.

It should be noted that there could be some circumstances in which the two criteria mentioned in this section could interact. For example, a public health authority could issue an alert or recommendation concerning the travel by people with a particular disease, but not make a determination that such persons could not travel at all. In these circumstances, a PVO could still restrict travel by persons with the disease if it met both the casual contact

transmission and severe health consequences prongs of the regulatory test in this section.

It is important that, in addressing communicable disease issues, PVOs act in a nondiscriminatory way. Policies for excluding passengers on the basis of communicable disease or illness must not be exercised to exclude disabled passengers disproportionately. For example, if only deaf individuals with norovirus are denied boarding, while hearing passengers with the same condition are allowed to board, there would be a violation of this rule.

In any case in which a medical certificate may be required or a limitation on a passenger's travel be imposed because of a communicable disease, the limitation would have to be the minimum needed to deal with the medical issue involved. For example, the PVO would not be authorized to deny transportation to an individual if a less drastic alternative, such as the passenger's use of medical measures that would reduce the likelihood of the transmission of an illness, is available.

If a PVO refuses transportation to a passenger with a disability on grounds related to a communicable disease or other medical condition, the PVO must permit the passenger to travel or use the vessel (or a comparable vessel for a comparable trip) at a later available date within one year at the same price as the original trip or, at the passenger's discretion, provide a refund. If there is not an available date for the passenger to be rebooked within one year, a refund would have to be provided.

Section 39.31 would prohibit a PVO from requiring a medical certificate in any situation other than the communicable disease situation discussed in section 39.31. This represents a change from the NPRM, in which the Department proposed to permit medical certificates in circumstances such as the use of personal oxygen supplies or a determination by vessel personnel that an individual could not travel successfully without requiring extraordinary medical assistance. The Department believes that, in the passenger vessel context (as distinct from airline service, on which these proposals were modeled), the risks that these proposals were intended to address are much less probable, and that imposing medical certificate requirements on passengers are consequently not justified.

Two commenters objected to allowing the PVO to require medical certification from a disabled individual under any circumstance. Other commenters were in favor of requiring medical documentation under all circumstances. Another commenter suggested allowing PVOs to restrict the number of passengers with disabilities that are at a very high risk of requiring emergency and/or extensive medical care during the course of the voyage. As noted above, the Department believes that provisions of this kind are unnecessary and could lead to unfair exclusions or restrictions for passengers. We therefore did not include such provisions in the final rule.

Section 39.35 May PVOs require a passenger with a disability to provide advance notice that he or she is traveling on or using a passenger vessel when no special services are sought?

Section 39.37 May PVOs require a passenger with a disability to provide advance notice in order to obtain particular auxiliary aids and services or to arrange group travel?

These related sections make clear that it is never appropriate for a PVO to require a person to provide advance notice simply that he or she is planning to travel, just because he or she has a disability. The PVO's nondiscriminatory policies and practices should be in place, regardless. On the other hand, there may be specific circumstances in which provision of advance notice is needed. These include to groups of 10 or more passengers with disabilities traveling together and the provision of a particular auxiliary aid or service (*e.g.,* a sign language interpreter). Numerous comments were received on these provisions. The main thrust of these comments was that PVOs need to know what sort of disabilities their passengers have in order to adequately plan to accommodate them from both a safety perspective and to provide them the best experience possible. The Department is sympathetic to this position and seeks to balance the right of privacy of the passengers with the need of PVOs to plan to accommodate and provide services to passengers. Passengers with a disability are not required to identify themselves as disabled when they are seeking no special privileges or services or auxiliary aids or services. PVOs can legitimately suggest that passengers with disabilities voluntarily self-disclose needs for special privileges or services, and it may be prudent for passengers to do so in order to avoid confusion.

However, with respect to groups of passengers with disabilities traveling together, a passenger may be required to identify that need to the PVO at the time of reservation. Likewise, a passenger seeking a particular auxiliary aid or service may be required to provide advance notice. PVOs' reservation and information systems must ensure that when passengers provide this notice, the information is transmitted clearly and on time to persons who need to provide the services involved. PVOs should consider soliciting information regarding the need for special assistance from all persons making a reservation.

Section 39.39 How do PVOs ensure that passengers with disabilities are able to use accessible cabins?

The Department anticipates that the forthcoming Access Board guidelines will address the scoping and dimensions of accessible cabins on new or altered vessels. While this rule consequently does not require vessels with overnight accommodations to have accessible cabins, we recognize that cabins identified by PVOs as accessible do exist on some vessels. This section concerns how PVOs would make sure that passengers with disabilities actually are able to get those accessible cabins. The Department recognizes that non-disabled passengers, understanding that accessible cabins are somewhat more roomy than other cabins in the same class of service, may sometimes seek to reserve those cabins, making them unavailable to passengers with disabilities.

The NPRM proposed a system in which a passenger requesting an accessible cabin would be required, at the PVO's request, to present documentation of the physical condition that necessitates use of an accessible cabin, at which point their reservations would trump even earlier reservations for an accessible cabin made by non-disabled passengers, though no passengers would ever be "bumped" from the voyage as a result. Some commenters objected to having to provide medical documentation. Others said that passengers with disabilities should be able to book an accessible cabin up to the day of sailing, while other commenters stated that reservations for accessible cabins should be made within a set time frame (*i.e.,* 72 hours) before departure.

In response to comments, the Department is deleting the proposed requirement that passengers provide documentation of their disability and revising the reservation requirements. Instead, the final rule includes what we believe is a simpler system, in which accessible cabins must be withheld from reservation until all cabins in that class of service have been reserved. If a passenger with a disability requests a remaining accessible cabin, then the

passenger with a disability gets that cabin. However, once all the other, non-accessible cabins have been booked, the PVO may, if it chooses, book the cabins for non-disabled passengers.

While the final rule does not require or permit medical documentation for persons reserving accessible cabins because they have a disability, PVOs have to ask persons seeking to reserve such a cabin whether they have a disability that requires use of the accessibility facilities provided in the cabin. In addition, PVOs may require a written attestation from the passenger that her or she needs the accessible features provided in the cabin. These provisions are modeled on an approach that is sometimes used concerning reserving accessible seating sports stadiums. PVOs must also investigate the potential misuse of accessible cabins and can take action against abusers (*e.g.,* a PVO may deny transportation to a non-disabled individual who books an accessible cabin on the basis of a misrepresentation that the individual has a disability).

The Department recognizes that some existing vessels may not have accessible cabins in all classes of service. PVOs, however, cannot properly impose costs on disabled passengers because vessels lack accessible cabins in some classes of service. If a passenger with a disability wants to travel in a less costly class of service, rather than a more expensive class, but the PVO has chosen to make adequate numbers of accessible cabins available only in more other expensive classes of service, the PVO must make accessible cabins available to passengers with disabilities at no more than the cost of the class of service the passenger requests. Under a nondiscrimination rule, disabled passengers, like all other passengers, should be able to purchase accommodations they can use at a price they are willing to pay.

Section 39.41 May a passenger with a disability be required to travel with another person?

The Department regards requiring a passenger with a disability to travel with another person, just because that person has a disability, as discriminatory on its face. Such a requirement is not only an affront to the independence and dignity of the passenger, but may sometimes make travel cost-prohibitive. In the NPRM, the Department proposed allowing PVOs to require a personal or safety assistant in some circumstances. This proposal was based on a parallel section of the ACAA rule. However, in the specific situation of passenger vessel transportation (which differs from air travel in a number of important respects), the Department believes that allowing PVOs to require an assistant could lead to abuse, and is not likely to be necessary in any event. The rule clearly states that crew members are not required to assist passengers with personal functions like eating, dressing, or toileting. Passengers who need assistance with these functions will therefore be aware that they cannot expect crew members to perform these functions and, consequently, will choose to travel with a companion if they need to. Vessel personnel are likewise trained to perform safety functions for all passengers.

One commenter asked if the PVO is allowed to require a personal caretaker for each disabled person where a group of passengers with a disability intend to bring only one caretaker for the group. Given that the rule does not permit requirements to travel with an attendant at all, the PVO could not impose such a requirement. Another commenter stated that this provision of the rule places all responsibility for care on the PVO regardless of the credibility of the passenger's claim of independence. Again, vessel personnel do not have personal care obligations with respect to passengers with disabilities. We do not believe that a passenger with a disability who cannot eat without assistance is likely to embark on a lengthy voyage without someone to help with eating.

Section 39.43 May PVOs impose special charges on passengers with a disability for providing services required by this rule?

Price discrimination is forbidden. PVOs may not charge higher fares to passengers with disabilities than to other passengers. PVOs cannot impose surcharges on passengers with disabilities, or any sort of extra or special charges for facilities, equipment, accommodations, or services that must be provided to passengers because they have a disability. This prohibition would apply not only to formal charges made by the PVO itself, but to informal charges that PVO personnel might seek to impose or pressure passengers with a disability to pay. For example, if a vessel cannot be boarded by a wheelchair user without assistance (*e.g.,* because the boarding ramp slope is too steep), it would not be appropriate for vessel personnel who provide boarding assistance to ask, pressure, or imply that the wheelchair users should provide a tip for the assistance.

One of the important implications of the prohibition on price discrimination concerns situations in which an accommodation for a person with a disability is available only in a more expensive type or class of service than the passenger requests. The most important application of this principle concerns reservations for accessible cabins, which are governed by section 39.39. However, the same principle would apply to other services or accommodations on board some ships as well. The only comment regarding this section stated that passengers requiring an accessible cabin should be provided the same pricing options available to passengers who do not require an accessible cabin. This section as written ensures this to be the case.

Section 39.45 May PVOs impose restrictions on passengers with a disability that they do not impose on other passengers?

Section 39.47 May PVOs require passengers with a disability to sign waivers or releases?

These related sections (*i.e.,* sections 39.45 and 39.47) would forbid restrictions on passengers with a disability that are not imposed on other passengers, including requirements to sign waivers or releases either for themselves or their assistive devices. The kinds of restrictions these sections address are restrictions created by PVO policy. The Department is aware that, particularly pending the adoption of passenger vessel physical accessibility standards, portions of existing vessels may well be inaccessible to some passengers with a disability. Inaccessibility of this kind would not violate these sections, but an administrative rule declaring certain portions of a vessel off limits to a passenger with a disability would, if that rule did not apply equally to all passengers. Likewise, waivers of liability or releases not required of all passengers cannot be required of passengers with a disability (including, but not limited to, waivers or releases concerning mobility devices).

Section 39.51 What is the general requirement for PVOs' provision of auxiliary aids and services to passengers?

This section requires PVOs to effectively communicate with passengers with disabilities, through the use of auxiliary aids or services where needed. This obligation includes effectively conveying information so that both the passenger and the PVO can be understood and understand what is being communicated. The language of the final rule distinguishes between the somewhat different obligations of public and private entities with regard to the

provision of auxiliary aids and services, and states the fundamental alteration and undue burden exception to these requirements. PVOs, not individuals with disabilities, have the responsibility to provide needed auxiliary aids and services.

"Undue burden" is one of the fundamental concepts in disability law, applying in a variety of contexts. The basic definition of what constitutes an undue burden is stated in the Department of Justice Title III rule, 28 CFR 36.104, as being something that involves significant difficulty or expense. In determining whether an action would result in an undue burden, the factors that the DOJ definition lists, adapted to the passenger vessel context, include

(1) The nature and cost of the action needed to comply with Part 39 requirements;

(2) The overall financial resources of the PVO involved, the number of persons employed by the PVO; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation of the vessel; or the impact otherwise of the action upon the operation of vessel;

(3) The geographic separateness, and the administrative or fiscal relationship of PVO in question to any parent corporation or entity;

(4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and

(5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

DOJ provides further information about its application of the concept in the preamble to its Title III regulation (discussion of 28 CFR 36.303(f), *see http://www.ada.gov/reg3a.html*).

It must be emphasized that because something creates some degree of cost and difficulty, it is not necessarily an undue burden. There are "due burdens," costs and difficulties that must be borne in order to afford nondiscriminatory service to individuals with disabilities. As the factors in the DOJ definition indicate, what may be an undue burden for a small entity (*e.g.,* because it would "break the bank" for that entity, making profitable operation impossible) may be a "due burden" that would be "small change" to a larger entity. Requiring an extensive and very expensive service to meet a minor, transitory need might be undue because it is disproportionate. "Undue burden" determinations inevitably involve the exercise of informed judgment about the facts of a given situation, but the bar is intended to be high: The concept is not intended to provide a free pass to entities to avoid nondiscrimination obligations. It should be emphasized, in the context of auxiliary aids and services, that even if one particular auxiliary aid or service creates an undue burden, the PVO retains an obligation to provide effective communication through use of another auxiliary aid or service that is not unduly burdensome.

One commenter said that, in order for a PVO to effectively communicate with individuals with hearing and visual impairments, the PVO should install advanced technology for videophones and instant messaging on its vessel. The Department believes it would be premature, as well as outside the scope of the notice for this rulemaking, to require a particular technology or vessel communication system at this time, but this is an issue that could be addressed as part of the future accessibility standard rulemaking.

Section 39.53 What information must PVOs provide to passengers with a disability?

The Department recognizes that some existing vessels may not be able to be made accessible to people with mobility impairments and that some ports (*e.g.,* some foreign ports at which a cruise ship calls) may not be usable by persons with some disabilities. This section requires PVOs to inform people with disabilities, accurately and in detail, about what they can expect.

Such information includes: (1) Any limitations of the usability of the vessel or portions of the vessel by people with mobility impairments; (2) any limitations on the accessibility of boarding and disembarking at ports at which the vessel will call (*e.g.,* because of the use of inaccessible lighters or tenders as the means of coming to or from the vessel); (3) any limitations on the accessibility of services or tours ancillary to the transportation provided by the vessel concerning which the PVO makes arrangements available to passengers; (4) limitations on the ability of passengers to take a service animal off the vessel at a foreign port (*e.g.,* because of quarantine regulations); and (5) the particular auxiliary aids or services available to passengers with hearing or vision impairments for each of the various on-board activities and services that require advance notice in order to be made available. With this information, potential passengers with a disability can make an informed choice about whether seeking transportation on a particular vessel is worth their while.

One commenter suggested that providing information about boarding and disembarking only to those passengers that self-identify as having a disability may cause confusion and bad feelings among those passengers with disabilities that did not self-identify. Moreover, the commenter recommended making such information available in all promotional materials including pre-boarding information, Web site, advertisements, the Daily Program, and in all brochures. The Department believes that there is merit in providing such information generally to all passengers. However, if a PVO provides this information to people who ask for it in order to accommodate a disability, that is sufficient to meet the PVO's obligation under the rule.

Section 39.55 Must information and reservation services of PVOs be accessible to individuals with hearing or vision impairments?

This section applies to information and reservation services made available to consumers in the United States, regardless of the nationality of a PVO or where the personnel or equipment providing the services are themselves based. If a PVO provides telephone reservation or information service to the public, the PVO must make this service available to individuals who are deaf or hard-of-hearing through use of a text telephone (TTY) or a TTY relay service (TRS). In response to comments received on this section, the Department will not require each PVO to have access to a text telephone, so long as they can receive calls through a text telephone relay service.

One commenter stated that this provision should include a Web accessibility requirement following the World Wide Web Consortium standards. The Department is aware that Web accessibility is an important issue for people with disabilities, and we will address this subject further during the next phase of passenger vessel rulemaking.

Another commenter recommended that individuals such as travel agents and boat crew who interact with consumers should receive training on what disability access is available. In reference to travel agents, the Department believes this is outside the scope of this rulemaking. As for employees, comments from PVOs asserted that crews are already trained to accommodate passengers with disabilities. The Department may further consider training requirements for crews during the development of the next phase of the passenger vessel rulemaking.

Section 39.57 Must PVOs make copies of this rule available to passengers?

PVOs must maintain a current copy of the text of this rule on each vessel and in every terminal which they serve. The copy may be a paper copy or a digital copy so long as it can be easily referenced by PVO employees and by passengers upon their request. Commenters supported this section as written. Private sector PVOs who do not receive Federal financial assistance are not required to make a copy of the rule available in languages other than English. However, any PVOs that do receive Federal financial assistance should be aware of their obligations concerning persons with lower English proficiency under Title VI of the Civil Rights Act of 1964, as amended, and applicable Executive Orders and regulations. As part of a PVO's obligation to communicate effectively, a PVO must make copies available in accessible formats on request, subject to the fundamental alteration provisions of section 39.51(c). If provision of the information is not feasible in one accessible format, because it would involve a fundamental alteration, then another accessible format would have to be made available.

Section 39.61 What requirements must PVOs meet concerning the accessibility of terminals and other landside facilities?

This section applies to landside facilities that the PVO owns, leases, or controls in the U.S. It requires compliance with the same ADA obligations as apply to other types of transportation facilities under 49 CFR part 37.

If the PVO does not own, lease, or control a facility, then the requirements of this section do not apply to it (there may well be situations in which a public entity or another private entity would own or control the facility, in which case the other entity would have its own ADA and/or section 504 obligations). In the case of a foreign facility, where ADA or section 504 rules would not apply in their own right, facility accessibility would then become a matter of the law of the country in which the facility is located. Commenters recommended that this section should be applied to facilities both inside and outside of the US. However, as noted in the discussion of the definition of "facility," the Department can apply this regulation only to facilities located in the U.S, since the ADA does not apply to landside facilities in foreign territory.

The rule makes a familiar three-part breakdown of accessibility responsibilities for covered facilities, similar to that found in DOT's existing ADA regulations (*see* 49 CFR part 37, subpart C). New facilities must meet accessibility standards from the beginning. In the case of an alteration, the altered portion of the existing facility has to be brought up to the same accessibility standards applicable to new facilities. For existing facilities not otherwise being altered, the PVO has to ensure that the facility is able to be used by a passenger with a disability to access the PVO's vessel. This could be achieved through a variety of means. As under other applications of the ADA, requirements for public sector entities under Title II and private sector entities under Title III differ somewhat with respect to existing facilities (*i.e.,* program accessibility vs. readily achievable barrier removal). These differences are stated in paragraph (c) of this section.

We note that there may be many situations in which a PVO shares accessibility responsibilities with another party. For example, a PVO may lease a portion of a port facility that is owned by a private or public entity. The PVO has responsibilities under this Part; the other entity may have responsibilities in its own right under Title II or III or the ADA and under section 504. In these cases, it would be up to the parties involved to allocate the responsibilities among themselves, so that they jointly ensure that accessibility requirements are met for the facility. Where the PVO does not own, lease, or control a facility, the PVO has no responsibility for making accessibility changes under this rule.

One commenter recommended that facilities used by small vessels should be exempt from this section. The Department again finds no basis for limiting the applicability of this provision based on vessel size. A landside facility operated by a small vessel PVO has no different status from one operated by a large PVO for ADA or section 504 purposes.

Section 39.63 What modifications and auxiliary aids and services are required at terminals and other landside facilities for individuals with hearing or vision impairments?

This section specifies that effective communication that has to be provided at terminals and other landside facilities to ensure that persons with sensory impairments will be able to request and receive the information otherwise available to the public, concerning such subjects as ticketing, fares, and schedules. A few commenters said that PVOs should not have to make changes to facilities that the PVO does not own or operate. Again, where the PVO does not own, lease, or control a facility, the PVO has no responsibility for making accessibility changes to the facility under this rule. Moreover, effective communication can be achieved through means, like auxiliary aids and services, that would not require modifications to facilities where a PVO is not able to make changes to the facility.

The Department proposed a one-year phase-in for both existing and new facilities in order to allow PVOs to explore and implement the best communications options for their customers and business operations. One commenter expressed that there should not be a phase-in period for this provision and that it should become effective immediately due to current technology and existing ADA requirements. The Department agrees, and in this final rule, makes this provision effective when the rule goes into effect.

Subpart E—Accessibility of Vessels

This subpart is reserved. It is a place-holder for the subsequent inclusion of passenger vessel physical accessibility standards based on future Access Board guidelines. We emphasize that this rule does not create standards for the design and construction of vessels and does not impose requirements to alter existing vessels for the purpose of accessibility. PVOs remain obligated, of course, to meet existing ADA requirements for readily achievable barrier removal (Title III) or program accessibility (Title II).

Section 39.81 What assistance must PVOs provide to passengers with a disability in getting to and from a passenger vessel?

This section does not deal with boarding a vessel, as such. Rather, it deals with how people get to the point of boarding a vessel, in terms of land transfers (*e.g.,* a bus between the airport and the terminal) and in actually moving through the terminal and boarding process up to the point of getting onto the vessel, where the PVO or a contractor to the PVO provides their services. PVOs are responsible for making sure that these services are accessible to people with disabilities. Representatives of the cruise line industry commented that requiring cruise lines to ensure the accessibility of services provided by third-party independent contractors, such as transportation to or from the cruise ship, would be unreasonable and a denial of

due process. This rule does not impose such an obligation if the PVO and the service provider, such as a taxi company, have no contractual relationship. This provision will not have extraterritorial application and will apply only with respect to terminals located in the U.S.

Section 39.83 What are PVOs' obligations for assisting passengers with a disability in getting on and off a passenger vessel?

The optimal solution for boarding a vessel involves a passenger with a disability being able to board independently (*e.g.,* via a level-entry ramp). The Department realizes that there will be many situations where this optimal solution does not exist. In these situations, the PVO is responsible for providing assistance that enables a passenger with a disability to get on or off the vessel. As noted above, this rule does not require vessel personnel to do the physically impossible with respect to providing boarding assistance. One commenter asked how a PVO is to decide between a passenger who is "not able to get on or off a passenger vessel without assistance" and one who can "readily get on or off a passenger vessel without assistance." In such a situation the PVO should ask the passenger whether he/she wants or needs assistance.

We note that a number of comments represented that these services are already being provided in many instances, so we believe it is fair to suggest that this requirement would not create significant added burdens for PVOs. We also note that this provision pertains to normal boarding and disembarkation from a vessel. Obviously, in the case of an "abandon ship" or other emergency situation, crew should use any means necessary to ensure that all passengers can safely evacuate.

The Department appreciates the comments received regarding accessible boarding systems and will use them to inform a future rulemaking in this area when the Access Board has provided appropriate standards on which a regulation can be based.

Section 39.85 What services must PVOs provide to passengers with a disability on board a passenger vessel?

Section 39.87 What services are PVOs not required to provide to passengers with a disability on board a passenger vessel?

These sections concern services that PVOs must provide or, alternatively, do not need to provide to passengers with a disability. The services a PVO must provide include movement about the vessel, but only with respect to portions of the vessel that are not accessible to passengers with a disability acting independently. To the extent that a PVO makes accessibility improvements to a vessel, the PVO can probably reduce its obligation to provide this service. When food is provided to passengers, PVO personnel must help passengers with a disability to a limited degree, including opening packages and identifying food, or explaining choices. Assistance in actual eating or other personal functions (*e.g.,* toileting or provision of medical equipment or supplies or assistive devices, beyond what is provided to all passengers) is not required. Effective communication of all on-board information is required.

Several commenters expressed that PVOs should be required to provide closed captioning on televisions, interpreters aboard the vessel (in theatres or other "public" rooms aboard the vessel), and wheelchairs for use by passengers. In this rulemaking, the Department is not mandating the use of any specific means of communication, though televisions, if provided for passengers, must have closed captioning. Otherwise, PVOs' obligation is to provide effective communication, through the use of auxiliary aids and services as appropriate for Title II or III entities, as the case may be. As for wheelchairs or other assistive devices, the Department believes this is the responsibility of the passenger and not the PVO, except to the extent that the PVO would need a wheeled mobility assistive device to provide boarding assistance to an individual who does not normally use such a device but could not board the vessel without one (*e.g.,* a semi-ambulatory person who can walk on a level surface but would have difficulty with a steep boarding ramp).

One commenter also expressed that sign language interpreters should be provided on vessels traveling inside and outside of the U.S. Use of sign language interpreters is one type of auxiliary aids and services, which may be provided subject to the fundamental alteration provisions of section 39.51(c).

Section 39.89 What requirements apply to on-board safety briefings, information, and drills?

This section specifies that safety-related information must be communicated effectively to passengers with disabilities. This would include the use of auxiliary aids and services, where needed. Safety videos would have to be captioned or have an interpreter inset, in order to make the information available to persons with impaired hearing. Providing safety information in this way is a key component of effective communication of this material to individuals who are deaf or who have hearing impairments. Passengers with disabilities must be enabled to participate in evacuation and other safety drills, and information about evacuation and safety procedures would have to be kept in locations that passengers with disabilities can access and use. Several commenters supported requiring PVOs to utilize flashing lights to warn passengers with hearing disabilities of emergencies. This issue will be addressed by the Access Board.

Section 39.91 Must PVOs permit passengers with a disability to travel with service animals?

Many persons with disabilities rely on service animals to travel and conduct daily functions. This section specifies that PVOs would be required to permit service animals to accompany a passenger with a disability on board a vessel.

Foreign countries may limit entry of service animals. This should not affect the carriage of service animals on the vessel, however, since there is no requirement that the animal leave the ship. Limitations on the ability of such an animal to leave the ship at a foreign port would be included in the information that a cruise ship would provide to potential customers inquiring about an upcoming cruise. Consistent with foreign port requirements, the PVO could insist that the animal not disembark at a port where doing so is not permitted. The user could leave the vessel even if the animal had to remain on board, however. PVOs and owners would have to work together to ensure that the animal was properly cared for in the owner's absence (*e.g.,* in the case of a lengthy excursion away from the vessel).

Several commenters said that PVOs should permit passengers with disabilities to bring their own food and supplies for service animals without any charge and provide refrigerators for proper storage of such food. PVO commenters said that PVOs should not be required to provide food for the animal, stating that there should be no charges for passengers using their own animal food and that most cruise lines currently follow this practice. Under the final rule, PVOs will not be required to provide food for service animals, but passengers may bring a reasonable quantity of their own food aboard the vessel at no additional charge. PVOs must provide refrigeration space for the animal food. This requirement applies

only to cruise ships or other vessels providing overnight accommodations. There is no need for refrigeration on short-voyage ferries or water taxis.

We view a limitation on the number of service animals that can be brought on a given voyage as tantamount to a number limit on passengers with a disability (*i.e.,* as a number limit), which this rule prohibits. It is not evident that having a number of such animals on board a ship at a given time would be disruptive to ship operations, and vague concerns about adverse effects on the quality of the cruise experience for other passengers do not trump the nondiscrimination imperative of the ADA.

While this rule does not require it, the Department believes that it is a good idea to permit not only service animals, *per se,* but also emotional support animals (ESA) to accompany passengers with disabilities who use them. This can be beneficial to individuals who genuinely need the assistance of such an animal to enjoy fully travel and services aboard a vessel. We refer PVOs and passengers with disabilities to applicable provisions of the Department's Air Carrier Access Act regulations and appendices (14 CFR part 382) for suggestions on how and in what circumstances it is appropriate to accommodate people using ESAs.

Commenters raised questions about animal relief areas aboard the vessel. Since this goes the design or construction of physical features of the a vessel, it is better addressed in the next rulemaking phase concerning accessibility standards.

Section 39.93 What wheelchairs and other assistive devices may passengers with a disability bring onto a passenger vessel?

Section 39.95 May PVOs limit their liability for the loss of or damage to wheelchairs and other assistive devices?

These sections say simply that passengers should be permitted to bring and use their own wheelchairs and other assistive devices on board a vessel. The cruise line industry stated that it does not support the use of mobility devices that are two-wheeled and allow an individual to "ride" the device. Another commenter expressed that the references to mobility aids and other assistive devices do not conform to the current standard found in 49 CFR part 37. The Department is currently reviewing and may revise its part 37 treatment of mobility aids.

With respect to mobility aids, the final rule is modeled on an approach supported by the Department of Justice. That is, manual and power wheelchairs and other manual mobility aids must be accommodated in any area open to pedestrian use. This requirement is intended to be implemented consistent with other provisions of the rule (*e.g.,* concerning existing facility accessibility, weight and balance concerns), which may in occasional situations limit the ability especially of larger power wheelchairs to be accommodated.

With respect to other powered mobility devices (*e.g.,* two-wheeled devices, such as Segways, designed or adapted for use by a person with a disability to accommodate that disability), PVOs would be required to make reasonable modifications in policies, practices, or procedures to allow such devices to be used by individuals with mobility disabilities, unless doing so would be inconsistent with legitimate safety requirements. The Department expects that, in most cases, such devices would be permitted to be used.

The Department strongly emphasizes that any such safety requirements cannot be pretextural and must be based on actual, demonstrable, risks and not on not mere speculation, stereotypes, or generalizations either about people with disabilities or their mobility devices. While the rule does not include a recordkeeping requirement concerning such safety requirements, a PVO subject to a complaint about arbitrarily excluding a mobility device would doubtless be asked to document the factual justification for any policy limiting passengers' devices.

These requirements apply to PVOs covered by both Title II and Title III of the ADA. In addition, Title II (*i.e.,* public sector) entities would have to minimize any restrictions placed on use of other powered mobility devices and provide a written explanation to the user, on request, of any exclusion or restriction of his or her device. This latter provision is found in the Title II enforcement provision of this regulation (section 36.109).

Once a device is on board, if the PVO is responsible for its loss or damage, the PVO must compensate the owner, at the level of the original purchase price of the device. One commenter stated that the appropriate cost for the loss of damaged assistive devices should be the current replacement cost for the device rather than the original purchase price. The Department is utilizing the original purchase price. This is the measure of the level of compensation found within the Department's ACAA rule, and we believe it will most appropriately compensate the owner for the loss of or damage to the device.

Section 39.101 What are the requirements for providing Complaints Resolution Officials?

Section 39.103 What actions do CROs take on complaints?

The Complaints Resolution Official (CRO) is the PVO's expert in disability matters, knowledgeable about both the Department's regulations and the PVO's procedures, and is able to assist passengers with disabilities and other PVO personnel in resolving issues. The CRO model should adapt very well to passenger vessels, to solve problems at the PVO level before they become matters for complaints to the DOT or DOJ.

A commenter expressed that it may be impractical and financially burdensome to have a CRO onboard each vessel. The Department does not mandate that CRO duties necessarily be full-time for a given employee, and CRO functions can be performed as collateral duties of existing personnel. PVOs could, for example, use a number of different vessel and landside personnel as CROs, who might perform these functions in addition to their other duties. We expect that PVOs will have varying degrees of formality in their CRO programs; however, no matter whether in a facility or on a vessel, all employees should be able to direct a passenger to the CRO.

PVOs are likely to find it necessary to ensure that not only CROs, but also other personnel who interact with passengers, are sufficiently knowledgeable regarding the requirements of these rules and proficient in performing tasks related to passengers with disabilities. (PVO commenters asserted that their personnel are already trained to deal properly with customers, including passengers with disabilities.) If they are not, it is likely that mistakes will be made that would potentially lead to noncompliance. Some commenters recommended the adoption of training standards or requirements in this rule. However, the Department is not instituting any formal training requirement at this time and will leave it to PVOs to decide how best to prepare their CROs, along with the remainder of their entire staff, to meet the responsibilities that PVOs have under this Part. If, over time, the Department becomes aware of implementation or compliance difficulties that appear to stem from a lack of training, the Department can revisit this issue.

One commenter expressed that certifying the training or drafting a

training curriculum would be difficult and unnecessary. This rule does not institute a certification requirement. Another commenter expressed that information about CROs should be posted on the PVO's Web site so that passengers have access to the information. We agree that sources of various information, including Web sites, should include information on the function of CROs and how to contact them, but we are not requiring this as part of this rule.

Section 39.105 How must PVOs respond to written complaints?

Section 39.107 Where may passengers obtain assistance with matters covered by this regulation?

The required responses to complaints under this section by the PVO may be in either written or e-mail form. At this time, the Department is not instituting a reporting requirement for complaints received by PVOs regarding violations of this rule. Upon analysis of operations under this rule, the Department may propose a reporting requirement at a later date. It should be noted that these sections concern the interaction between PVOs and passengers; these are not procedures for Federal agency responses to complaints made to DOT or DOJ. For example, DOJ does not follow these procedures when it receives a complaint concerning a Title III PVO.

One commenter suggested that deadlines be put into place to ensure that complaints do not languish and that a timely resolution is received. The commenter also suggested that there should be an outside organization for aggrieved passengers to take complaints to if they are not satisfied with the CRO resolution. In so far as deadlines are concerned, these sections, as written, provide deadlines for filing and responding to complaints. In reference to appeals of a PVO's decision, the complainant has the ability to pursue DOT or DOJ enforcement action, for Title II or Title III entities, respectively. The PVO must notify the complainant of this right.

Section 39.109 What enforcement actions may be taken under this Part?

One important difference between the ACAA and the ADA is that, under the former, the Department has its own civil penalty enforcement authority and procedures. The Department does not have its own civil penalty authority under Titles II and III of the ADA, though the Department can conduct investigations and compliance reviews, collect data, find facts, come to conclusions, and refer matters to the Department of Justice for further action under section 504 and Title II. The Departmental Office of Civil Rights (DOCR) will be the central point for receiving such complaints. DOJ has the jurisdiction to conduct investigations and take enforcement action under Title III, which can lead to the imposition of damages and civil penalties.

Some PVOs receive Federal financial assistance, such as ferry operators who receive Federal Transit Administration (FTA) funding. Complaints concerning violations of this Part by FTA-assisted ferry operators could be made to the FTA under the Department's ADA and section 504 rules, and FTA could take enforcement action as provided in those rules. No comments were received on this section and it is adopted as written.

Request for Comments: This rule is a final rule with a request for comments limited to three issues. All provisions will go into effect on November 3, 2010. With respect to the three issues on which the Department is seeking further comment, the Department intends, before the effective date of the rule, to publish either an amended final rule or a notice explaining why no further changes are being made.

The first issue concerns use by passengers with disabilities of emotional support animals. Unlike service animals, emotional support animals are not trained to perform specific physical tasks, but by their presence assist individuals with mental health-related disabilities in coping with the effects of their disabilities. For example, an emotional support animal may assist an individual with a severe anxiety disorder in dealing with the stresses of travel. In the absence of this assistance from the animal, the individual could find travel very difficult or impossible.

As noted in the preamble discussion of section 39.91, this rule does not require PVOs to provide access to emotional support animals. In another disability discrimination context, under the Air Carrier Access Act, the Department requires air carriers to permit emotional support animals to travel with their users. The Department seeks comment on whether PVOs should be required to allow access for individuals with disabilities and their emotional support animals. If PVOs are required to do so, what, if any, safeguards against abuse (*e.g.,* passengers attempting to pass off their pets as emotional support animals) should be included?

The service animal provisions as currently written in this rule are consistent with DOJ's proposed rules amending Title II and Title III. Should DOT rules be identical to DOJ rules in this with respect to emotional support animals (*i.e.,* such that the use of emotional support animals is treated the same way on passenger vessels as it is in other public accommodations covered by DOJ rules, such as parks, restaurants, dorms, lodging, hospitals, *etc.*)? Alternatively, should DOT have discretion to have different provisions specific to vessels?

The second issue concerns the treatment of mobility aids. Section 39.93 divides mobility devices into two categories: Wheelchairs and other power-driven mobility devices. Wheelchairs have a specific definition in section 39.3, including "three or four-wheeled devices, usable indoors, designed for and used by individuals with mobility impairments, whether operated manually or powered." Under section 39.93, PVOs must permit wheelchairs to be used in any area open to pedestrian use, though, as noted in the preamble discussion of section 39.25, there could be circumstances in which a particular wheelchair does not fit a particular space.

PVOs can limit the use of other power-driven mobility aids by applying a series of factors set forth in paragraph 39.93(b). The application of these factors could give PVOs greater discretion to permit or refuse use of devices that did not meet the definition of "wheelchair," (*e.g.,* devices that otherwise look like traditional wheelchairs but have six wheels, two-wheeled devices like Segways) than they have with respect to wheelchairs. The Department seeks comment two sets of questions related to the handling of mobility aids.

First, should a PVO have to demonstrate (*i.e.,* bear a burden of proof) that it has a sound basis for excluding or restricting a passenger's other power-driven mobility aid? Should there be any basis other than safety (*i.e.,* inconsistency with a legitimate safety requirement) for a decision to exclude or limit a device? Should it be made clear that a device, even if not originally designed for use by individuals with disabilities, should be accepted on board a vessel if it is adapted for use by a passenger with a disability, again subject to legitimate safety requirements?

Second, should the entire approach to mobility aids be rethought? For example, it may not be necessary to distinguish between categories of mobility aids at all. One commenter to the NPRM suggested adopting the term "wheeled mobility assistive device" be used in place of other terms. In this concept, if a wheeled mobility assistive

device, however it is designed, can be accommodated on board a vessel, consistent with legitimate safety requirements, it would have to be accepted by the PVO, regardless of whether it was a "wheelchair," *per se.* The Department seeks comment on this approach and on whether, if adopted, it should include any categorical exceptions (*e.g.,* gasoline engine-powered devices). For information, the Department refers interested persons to the Department's September 2005 interpretation of its existing ADA regulation (49 CFR part 37) concerning acceptance of mobility aids [*http://www.fta.dot.gov/civilrights/ada/civil_rights_3893.html*].

Similar to the emotional support animal issue earlier, the mobility aid provisions as currently written in this rule are consistent with DOJ's proposed rules amending Title II and Title III. Should DOT rules be identical to DOJ rules in this with respect to mobility aids (*i.e.,* such that the use of mobility aids is treated the same way on passenger vessels as it is in other public accommodations covered by DOJ rules, like as parks, restaurants, dorms, lodging, hospitals, *etc.*)? Alternatively, should DOT have discretion to have different provisions specific to vessels?

The third issue the Department seeks comment on concerns the overall relationship between DOJ and DOT ADA rules. DOJ currently has draft final rules revising its Title II and Title III DOT rules under review by the Office of Management and Budget (OMB). It is possible that, as part of the interagency review process led by OMB, provisions in the DOJ rules (*e.g.,* concerning the definition of auxiliary aids and services and the application of that definition) might change in a way that create a difference between the language of part 39 and the language of the forthcoming DOJ rules. In such a situation, should DOT amend part 39 to be consistent with the new DOJ language? The purpose of doing so would be to avoid confusion or any burden placed on people with disabilities or PVOs that might arise if different definitions or substantive provisions of different rules applied in the specific context of passenger vessel operations, as distinct from other aspects of public accommodations or public sector facilities and activities covered by, DOJ rules.

Regulatory Analyses and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

This is a significant rule under Executive Order 12866 and DOT Regulatory Policies and Procedures purposes. This is because the rule address issues of considerable policy interest and creates requirements for entities that have not previously been subject to regulation. However, the rule does not impose significant costs. The main thrust of the rule is to prohibit PVOs from taking actions—such as requiring attendants, denying transportation, limiting access for service animals, or imposing special charges—that create barriers to travel by persons with disabilities. There is little, if any, cost to a PVO from avoiding taking discriminatory actions. According to comments received at both the ANPRM and NPRM stages, many PVOs already provide boarding assistance and other services to passengers with disabilities, so it is reasonable to assume that the passenger assistance provisions of this rule will not have significant incremental costs. This rule does not impose a training requirement or reporting requirements.

In the section of the preamble responding to the Regulatory Flexibility Act, the Department will discuss the cost impacts, or lack of same, from some specific sections of the rule.

Some commenters did express concern about potential costs of the NPRM. These comments largely were the result of commenters mistakenly believing that the NPRM proposed requiring PVOs to physically alter vessels, especially small vessels. In fact, the NPRM did not propose, and the final rule does not require, alterations to vessels for the purpose of achieving accessibility. The rule takes vessels as they are and focuses on the policies and practices of PVOs with respect to the use of the vessels by passengers with disabilities.

In a future rulemaking, the Department anticipates proposing, in conjunction with the Access Board, design and construction standards for vessels. These standards will affect new vessels and alterations to existing vessels. This future rulemaking is expected to involve a more detailed regulatory evaluation with respect to the costs and benefits of its proposals.

In the passenger vessel context, as in other areas, the purpose of the ADA is to ensure nondiscrimination on the basis of disability and accessibility of travel on vessels for people with disabilities. Consequently, the most important benefits of this rule are the largely non-quantifiable benefits of increased access and mobility for passengers with disabilities. Policies required by this rule will eliminate most practices of PVOs that prevent or inhibit travel by persons with disabilities. The benefits that will accrue from removal of these barriers cannot be quantified, but could well include increased employment, business, recreational, and educational opportunities for travelers with disabilities, and quality of life enhancements associated with travel opportunities both within the U.S. and to foreign points.

Many persons with mobility impairments will be able to use passenger vessel services for the first time, and take advantage of an expanded range of travel opportunities. Even persons with disabilities who do not immediately choose to use a passenger vessel will know that barriers to such travel have been removed, and there is a psychological benefit to knowing one can travel if one wishes (what economists sometimes refer to as the "option value" of a regulatory provision).

Other beneficiaries of this rule include the travel companions, family, and friends of passengers with disabilities, since persons with disabilities would have greater and more varied travel opportunities. In addition, to the extent that changes in PVO practice make use of vessels easier for everyone, there will be indirect benefits for the general traveling public.

Because making passenger vessel transportation and services more readily available to passengers with disabilities and others traveling with them is likely to increase overall usage of vessels to some degree, it is likely that there will be some economic benefits to PVOs from compliance with the rule, though the Department does not have information allowing us to quantify these potential benefits.

Regulatory Flexibility Act

In considering this rule from the point of view of the Regulatory Flexibility Act, we emphasize two main points. First, for the reasons discussed above, we believe strongly that the overall costs of the rule to any entities—large or small—will be very low. The rule will not create significant economic impacts on anyone. In particular, the Department here repeats what it has said throughout the rulemaking: The rule does not impose design and construction standards that will require vessel operators, large or small, to alter their vessels.

Second, compared to the NPRM, the number of small entities subject to the rule is greatly reduced. The final rule covers only private entities primarily engaged in the business of transporting people, eliminating from coverage private entities not primarily engaged in the business of transporting people. The

vast majority of small entities that the NPRM would have covered (*e.g.,* fishing charter boats, sightseeing and dinner cruise boats, dive boats) are not subject to the final rule. Of the private entities primarily engaged in the business of transporting people that the rule does cover, most—such as cruise ships and public ferry systems—are not small entities. Some, such as smaller ferry or water taxi operations, may be small entities. While the number of small entities covered by the final rule is not ascertainable from the record of this rulemaking, the Department believes that it is highly unlikely to be substantial.

The Small Business Administration (SBA) Office of Advocacy commented on the NPRM. One of the primary SBA comments concerned SBA's estimate that a very large number of small businesses would be covered by the rule. Given the change in the final rule to cover only private entities primarily engaged in the business of transporting people, SBA's estimate—based almost entirely on private entities not primarily engaged in the business of transporting people—is no longer applicable. We recognize that there could also be some small public entities that are covered by the rule (*e.g.,* a small municipality that operates a ferry or water taxi service), though the record of the rulemaking does not provide a basis for knowing whether this is the case or estimating how many there may be. Because the costs of the rule to any entities is minimal, there would not be a significant cost to these Title II entities.

SBA also pointed to certain sections of the rule that it thought could involve costs. With respect to section 39.3, SBA asked that the Department should make clear that there is no liability for discrimination based on the accessibility of existing vessels. As stated elsewhere, this rule does not impose any incremental obligation to alter existing vessels for the purpose of accessibility. PVOs, like other entities, remain subject to the existing ADA requirements to provide program accessibility (Title II) or to ensure readily achievable barrier removal (Title III). SBA also suggested making compliance materials available regarding the rule's definitions, particularly if there are conflicting definitions between DOJ rules and the Air Carrier Access Act. Under this or any rule, no one is required to comply with a definition. Compliance is required only with substantive provisions of a rule. The final rule has harmonized DOT passenger vessel rule provisions with DOJ ADA rule provisions.

With respect to section 39.13, SBA said the small business community was confused about the difference between this rule and forthcoming Access Board guidelines, and that the effective date of the rule should be extended six months. The distinction is actually a very clear and simple one: This rule concerns the policies that PVOs apply to passengers with disabilities on their vessels and does not create design or construction standards for new or altered vessels. The forthcoming Access Board guidelines will create design and construction standards for new and altered larger vessels (*e.g.,* those with a passenger capacity of over 150 passengers or over 49 spaces for overnight accommodations), but will not address the kinds of policy issues that the current DOT rule addresses. The Department is making this rule effective 120 days from the date of publication, and we do not believe a longer lead time is needed to assist the relatively few remaining small PVOs covered by the rule in understanding this straightforward point. Through long experience, the Department has found it most helpful to issue guidance (*e.g.,* questions and answers) after a regulation has gone into effect, when both we and the regulated parties have had time to determine what implementation and interpretation questions of general interest are valuable to address.

With respect to sections 39.29 (39.27 in the NPRM) and 39.93, SBA asserted that there was a paperwork burden, a recordkeeping requirement, and a training burden. Section 39.29 of the final rule in fact requires neither paperwork, nor recordkeeping, nor training. It simply directs vessel operators not to impose number limits, except where legitimate safety requirements (*i.e.,* with regard to weight and balance) dictate otherwise. In most instances, given that the final rule focuses on larger vessels, this exception is unlikely to come into play. Section 39.93 has been revised for greater consistency with the Department of Justice's approach to mobility aid issues, and likewise does not include recordkeeping or training requirements. In one category of cases—denial of access to an "other powered mobility device" by a public entity, the entity would have to provide a written explanation on the passenger's request. Given that public entities covered by the rule—mostly large public ferry systems—are not small entities, and that it is likely there would be few instances in which mobility devices would be denied passage, and fewer still in which the passenger asked for a written explanation, the Department believes that the cost and burden of this requirement would be very minor.

With respect to the advance notice provisions of the rule (39.33 and 39.35 in the NPRM, 39.35 and 39.37 of the final rule), SBA requested that the Department respond to the comment that operators of small vessels should be able to require advance notice for fewer than the proposed group of 10 or more disabled passengers traveling together. As noted above, most of the vessels to which this comment pertained are not covered by the final rule. Moreover, comments did not suggest a persuasive reason why, for example, a group of four or six wheelchair users should be burdened with an advance notice requirement simply because the size of the vessel or size of the business operating the vessel is smaller. The Department believes the 10-person group provision is sensible, and it remains in the final rule.

With respect to section 39.83, concerning assistance by vessel personnel in getting persons with disabilities on and off the vessel, SBA asked the Department to provide estimates of the costs of providing such assistance, as a "new requirement." As SBA acknowledged, commenters to the NPRM said that their personnel commonly performed this function already. In analyzing the costs of a rule, the Department focuses on incremental costs, not assuming a baseline in which no one is performing something required by the rule. The information in the record suggests that the incremental costs of this provision of the rule would be low, and the record does not provide information on how many vessel operators (particularly the relatively few small PVOs that the final rule covers) currently decline to provide boarding assistance to passengers with disabilities. While the record therefore does not support a quantified estimate of the incremental costs of this requirement to small entities, the Department is justified, based on the evidence of the record, for estimating that it would be very low.

Concerning service animals, SBA suggested that there should be an exception to the rule that would allow very small vessels to deny passage for safety reasons. As noted above, the number of very small vessels covered by the rule is likely to be very small. Denial of access to a service animal is tantamount to denying transportation to its user. Consequently, the provisions of section 39.27, concerning exclusion of a passenger with disabilities in connection with legitimate safety

requirements, would apply in a case where a PVO believed it should exclude a service animal for safety reasons. SBA also notes that smaller ferries and other small vessels might not have refrigerators on board to store food for service animals. There is no need to refrigerate animal food on the short trips typically run by small ferries or water taxis, so the issue would likely never arise. The need to store and refrigerate animal food would most likely arise on vessels that provide overnight accommodations, which typically are larger vessels.

With respect to complaints resolution officers (CROs; sections 39.101–39.105) SBA requests an estimate of the costs of this requirement. As SBA concedes, there are no training requirements for CROs in the final rule, and many of the same personnel already receive customer relations and safety training. Consequently, the incremental cost of getting small entities' CROs to the point of proficiency is limited to the time to read and understand the rule. The rule is not excessively lengthy, with the regulatory text likely to amount to around 7–8 **Federal Register** pages. It is not necessary for CROs to memorize the rule, only to become familiar enough with it to know what provisions to reference when a question or issue arises. It is fair to assume that this task would take an hour. Suppose there are 500 small PVOs covered by the rule (likely an overgenerous number). Then the total burden would be 500 work hours. To make a cost estimate, one would multiply this number of hours by the average hourly wage of PVO personnel who would read the rule. If this average is $20/hour, then the total cost of the requirement for small PVOs would be $10,000.

To estimate the cost and burden of having CROs working for small entities to provide responses to written complaints, it would be necessary to estimate how many such complaints there will be. The record of the rulemaking provides no basis for making such an estimate. The main purpose of the CRO requirement is to resolve problems before they turn into written complaints. Likewise, the purpose of the entire rule is to set forth explicit expectations for PVO policies, so that PVOs do not conduct themselves in ways that give rise to complaints. Many vessel industry commenters said that they emphasize providing good customer service to passengers with disabilities. If true, this would minimize the occurrence of complaints. For these reasons, the Department believes that the number of written complaints involving small entities would be small. If we assume that the task of gathering information for and writing a letter to a complainant would take four hours, and that 20 percent of the hypothetical 500 PVOs—100 entities—had one complaint filed against them per year, the task would occupy 400 work hours. Again, if we multiply this figure by the average hourly wage of the CRO—assuming, as before, that this is $20/hour—then the annual total is $8,000. It is possible to plug in a variety of assumptions about the number of CROs, the number of complaints, and the wage rates involved, but the bottom line remains a very modest economic impact in any plausible scenario.

Parties aggrieved by PVO misconduct already have the authority to bring litigation under the ADA or to complain to DOJ about disability discrimination. The *Spector* case, cited earlier in this preamble, is the most prominent example of such litigation, having been decided by the Supreme Court.

Because the costs of the rule are minimal to any covered parties, and because the number of small entities affected is likely to be very small, I certify that this rule will not have a significant economic effect on a substantial number of small entities.

Federalism

While there are some State and local entities (*i.e.* operators of State or municipal ferry systems) that would be covered by this rule, most regulated parties are private entities. The rule will not create any significant changes in the Federal/State/local relationship with respect to these entities, and has no pre-emptive effect. Consequently, we have concluded that there are not sufficient Federalism impacts to warrant the preparation of a Federalism assessment.

List of Subjects in 49 CFR Part 39

Individuals with disabilities, Mass transportation, Passenger vessels.

Issued this 16th day of June 2010 at Washington, DC.

Ray LaHood,

Secretary of Transportation.

■ For the reasons set forth in the preamble, the Department of Transportation is amending 49 CFR subtitle A by adding a new 49 CFR part 39, to read as follows:

PART 39—TRANSPORTATION FOR INDIVIDUALS WITH DISABILITIES: PASSENGER VESSELS

Subpart A—General

Sec.
39.1 What is the purpose of this Part?
39.3 What do the terms in this rule mean?
39.5 To whom do the provisions of this Part apply?
39.7 What other authorities concerning nondiscrimination on the basis of disability apply to owners and operators of passenger vessels?
39.9 What may the owner or operator of a foreign-flag vessel do if it believes a provision of a foreign nation's law prohibits compliance with a provision of this Part?
39.11 [Reserved]
39.13 When must PVOs comply with the provisions of this Part?

Subpart B—Nondiscrimination and Access to Services

39.21 What is the general nondiscrimination requirement of this Part?
39.23 What are the requirements concerning contractors to owners and operators of passenger vessels?
39.25 May PVOs refuse to provide transportation or use of a vessel on the basis of disability?
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39.29 May PVOs limit the number of passengers with a disability on a passenger vessel?
39.31 May PVOs limit access to transportation or use of a vessel on the basis that a passenger has a communicable disease?
39.33 May PVOs require a passenger with a disability to provide a medical certificate?
39.35 May PVOs require a passenger with a disability to provide advance notice that he or she is traveling on or using a passenger vessel when no special services are sought?
39.37 May PVOs require a passenger with a disability to provide advance notice in order to obtain particular auxiliary aids and services or to arrange group travel?
39.39 How do PVOs ensure that passengers with disabilities are able to use accessible cabins?
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39.43 May PVOs impose special charges on passengers with a disability for providing services required by this rule?
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39.61 What requirements must PVOs meet concerning the accessibility of terminals and other landside facilities?
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Subpart E—Accessibility of Vessels [Reserved]

Subpart F—Assistance and Services to Passengers with Disabilities

39.81 What assistance must PVOs provide to passengers with a disability in getting to and from a passenger vessel?
39.83 What are PVOs' obligations for assisting passengers with a disability in getting on and off a passenger vessel?
39.85 What services must PVOs provide to passengers with a disability on board a passenger vessel?
39.87 What services are PVOs not required to provide to passengers with a disability on board a passenger vessel?
39.89 What requirements apply to on-board safety briefings, information, and drills?
39.91 Must PVOs permit passengers with a disability to travel with service animals?
39.93 What wheelchairs and other assistive devices may passengers with a disability bring onto a passenger vessel?
39.95 May PVOs limit their liability for the loss of or damage to wheelchairs and other assistive devices?

Subpart G—Complaints and Enforcement Procedures

39.101 What are the requirements for providing Complaints Resolution Officials?
39.103 What actions do CROs take on complaints?
39.105 How must PVOs respond to written complaints?
39.107 Where may persons obtain assistance with matters covered by this regulation?
39.109 What enforcement actions may be taken under this Part?

Authority: 42 U.S.C. 12101 through 12213; 49 U.S.C. 322; 29 U.S.C. 794.

Subpart A—General

§ 39.1 What is the purpose of this Part?

The purpose of this Part is to carry out the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 with respect to passenger vessels. This rule prohibits owners and operators of passenger vessels, including U.S. and foreign-flag vessels, from discriminating against passengers on the basis of disability; requires vessels and related facilities to be accessible; and requires owners and operators of vessels to take steps to accommodate passengers with disabilities.

§ 39.3 What do the terms in this rule mean?

In this regulation, the terms listed in this section have the following meanings:

"Accessible" means, with respect to vessels and facilities, complying with the applicable requirements of this Part.

"The Act" or "ADA" means the Americans with Disabilities Act of 1990 (Pub. L. 101–336, 104 Stat. 327, 42 U.S.C. 12101–12213 and 47 U.S.C. 225 and 611), as it may be amended from time to time.

"Assistive device" means any piece of equipment that assists a passenger with a disability to cope with the effects of his or her disability. Such devices are intended to assist a passenger with a disability to hear, see, communicate, maneuver, or perform other functions of daily life, and may include medical devices.

"Auxiliary aids and services" includes:

(1) Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

(2) Qualified readers, taped texts, audio recordings, brailed materials and displays, screen reader software, magnification software, optical readers, secondary auditory programs (SAP), large print materials, accessible electronic and information technology, or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

(3) Acquisition or modification of equipment or devices; or

(4) Other similar services or actions.

"Coast Guard" means the United States Coast Guard, an agency of the Department of Homeland Security.

"Commerce" means travel, trade, transportation, or communication among the several States, between any foreign country or any territory and possession and any State, or between points in the same State but through another State or foreign country.

"Department" or "DOT" means the United States Department of Transportation, including any of its agencies.

"Designated public transportation" means transportation provided by a public entity by passenger vessel that provides the general public with general or special service, including charter service, on a regular and continuing basis.

"Direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.

''Disability'' means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

(1) The phrase *physical or mental impairment* means—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine;

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

(iii) The term physical or mental impairment includes, but is not limited to, such contagious or noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments; cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease, tuberculosis, drug addiction and alcoholism;

(iv) The phrase physical or mental impairment does not include homosexuality or bisexuality.

(2) The phrase *major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and work.

(3) The phrase *has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) The phrase *is regarded as having such an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities, but which is treated by a public or private entity as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits a major life activity only as a result of the attitudes of others toward such an impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a public or private entity as having such an impairment.

(5) The term disability does not include—

(i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) Compulsive gambling, kleptomania, or pyromania; or

(iii) Psychoactive substance abuse disorders resulting from the current illegal use of drugs.

"Facility" means all or any portion of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

"Individual with a disability" means a person who has a disability, but does not include an individual who is currently engaging in the illegal use of drugs, when a public or private entity acts on the basis of such use.

"Operates" includes, with respect to passenger vessel service, the provision of transportation by a public or private entity itself or by a person under a contractual or other arrangement or relationship with the entity.

"Passenger for hire" means a passenger for whom consideration is contributed as a condition of carriage on the vessel, whether directly or indirectly flowing to the owner, charterer, operator, agent, or any other person having an interest in the vessel.

"Passenger vessel" means any ship, boat, or other craft used as a conveyance on water, regardless of its means of propulsion, which accepts passengers, whether or not for hire. The term does not include boats or other craft rented or leased to and operated solely by consumers or fixed floating structures permanently moored or attached to a landside facility.

"Passenger vessel owner or operator (PVO)" means any public or private entity that owns or operates a passenger vessel. When the party that owns a passenger vessel is a different party from the party that operates the vessel, both are responsible for complying with the requirements of this Part. To be a PVO for purposes of this Part, a private entity must be a private entity primarily engaged in the business of transporting people, as determined by the Department of Transportation in consultation with the Department of Justice.

"Private entity" means any entity other than a public entity that is primarily engaged in the business of transporting people.

"Public entity" means:

(1) Any State or local government; or

(2) Any department, agency, special purpose district, or other instrumentality of one or more State or local governments (including an entity established to provide public ferry service).

"Qualified individual with a disability" means an individual with a disability—

(1) Who, as a passenger (referred to as a "passenger with a disability"), with respect to obtaining transportation on or use of a passenger vessel, or other services or accommodations required by this Part,

(i) Buys or otherwise validly obtains, or makes a good faith effort to obtain, a ticket for transportation on a passenger vessel and presents himself or herself at the vessel for the purpose of traveling on the voyage to which the ticket pertains; or

(ii) With respect to use of a passenger vessel for which members of the public are not required to obtain tickets, presents himself or herself at the vessel for the purpose of using the vessel for the purpose for which it is made available to the public; and

(iii) Meets reasonable, nondiscriminatory requirements applicable to all passengers; or

(2) Who, with respect to accompanying or meeting a traveler, using ground transportation, using facilities, or obtaining information about schedules, fares, reservations, or policies, takes those actions necessary to use facilities or services offered by the PVO to the general public, with reasonable modifications, as needed, provided by the PVO.

"Secretary" means the Secretary of Transportation or his/her designee.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394, 29 U.S.C. 794), as amended.

"Service animal" means any guide dog, signal dog, or other animal individually trained to work or perform tasks for an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, alerting persons with seizure disorders to the onset of a seizure, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.

"Specified public transportation" means transportation by passenger vessel provided by a private entity to the general public, with general or special service (including charter service) on a regular and continuing basis, where the private entity is primarily engaged in the business of transporting people.

"Terminal" means, with respect to passenger vessel transportation, the portion of a property located adjacent to a dock, entry ramp, or other means of boarding a passenger vessel, including areas through which passengers gain access to land transportation, passenger shelters, designated waiting areas, ticketing areas, and baggage drop-off and retrieval sites, to the extent that the PVO owns or leases the facility or exercises control over the selection, design, construction, or alteration of the property.

"United States" or "U.S." means the United States of America, including its territories, commonwealths, and possessions.

"Wheelchair" means any mobility aid belonging to any class of three or four-wheeled devices, usable indoors, designed for and used by individuals with mobility impairments, whether operated manually or powered.

"You" means the owner or operator of a passenger vessel, unless the context requires a different meaning.

§ 39.5 To whom do the provisions of this Part apply?

(a) Except as provided in paragraph (b) or (c) of this section, this Part applies to you if you are the owner or operator of any passenger vessel, and you are:

(1) A public entity that provides designated public transportation; or

(2) A private entity primarily engaged in the business of transporting people whose operations affect commerce and that provides specified public transportation;

(b) If you are the PVO of a foreign-flag passenger vessel, this Part applies to you only if your vessel picks up passengers at a port in the United States, its territories, possessions, or commonwealths.

§ 39.7 What other authorities concerning nondiscrimination on the basis of disability apply to owners and operators of passenger vessels?

(a) If you receive Federal financial assistance from the Department of Transportation, compliance with applicable requirements of this part is a condition of compliance with section 504 of the Rehabilitation Act of 1973 and of receiving financial assistance.

(b) You are also subject to ADA regulations of the Department of Justice (28 CFR part 35 or 36, as applicable).

§ 39.9 What may the owner or operator of a foreign-flag vessel do if it believes a provision of a foreign nation's law prohibits compliance with a provision of this Part?

(a) If you are the PVO of a foreign-flag vessel, and you believe that a binding legal requirement of a foreign nation precludes you from complying with a provision of this Part, you may request a waiver of the provision of this Part.

(b) You must send such a waiver request to the Department.

(c) Your waiver request must include the following elements:

(1) A copy, in the English language, of the foreign law involved;

(2) A description of how the binding legal requirement of a foreign nation applies and how it precludes compliance with a provision of this Part;

(3) A description of the alternative means you will use, if the waiver is granted, to effectively achieve the objective of the provision of this Part subject to the waiver or, if applicable, a justification of why it would be impossible to achieve this objective in any way.

(d) If you submit such a waiver request before November 3, 2010 you may continue to apply the foreign legal requirement pending the Department's response to your waiver request.

(e) The Department shall grant the waiver request if it determines that the binding legal requirement of a foreign nation applies, that it does preclude compliance with a provision of this Part, and that the PVO has provided an effective alternative means of achieving the objective of the provision of this Part subject to the waiver or clear and convincing evidence that it would be impossible to achieve this objective in any way.

§ 39.11 [Reserved]

§ 39.13 When must PVOs comply with the provisions of this part?

You are required to comply with the requirements of this part beginning November 3, 2010, except as otherwise provided in individual sections of this part.

Subpart B—Nondiscrimination and Access to Services

§ 39.21 What is the general nondiscrimination requirement of this part?

(a) As a PVO, you must not do any of the following things, either directly or through a contractual, licensing, or other arrangement:

(1) You must not discriminate against any qualified individual with a disability, by reason of such disability, with respect to the individual's use of a vessel;

(2) You must not require a qualified individual with a disability to accept special services that the individual does not request;

(3) You must not exclude a qualified individual with a disability from or deny the person the benefit of any vessel transportation or related services that are available to other persons, except when specifically permitted by another section of this Part; and

(4) You must not take any action against an individual (*e.g.,* refusing to provide transportation) because the individual asserts, on his or her own behalf or through or on behalf of others, rights protected by this part or the ADA.

(b)(1) As a PVO that is a private entity, you must make reasonable modifications in policies, practices, or procedures when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless you can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

(2) As a PVO that is a public entity, you must make reasonable modifications in policies, practices, or procedures when necessary to avoid discrimination on the basis of disability, unless you can demonstrate that making the modifications would fundamentally alter the nature of the services, programs, or activities you offer.

§ 39.23 What are the requirements concerning contractors to owners and operators of passenger vessels?

(a) If, as a PVO, you enter into a contractual or other arrangement or relationship with any other party to provide services to or affecting passengers, you must ensure that the other party meets the requirements of this Part that would apply to you if you provided the service yourself.

(b) As a PVO, you must include an assurance of compliance with this Part in your contracts or agreements with any contractors who provide to the public services that are subject to the requirements of this Part. Noncompliance with this assurance is a material breach of the contract on the contractor's part. With respect to contracts or agreements existing on November 3, 2010, you must ensure the inclusion of this assurance by November 3, 2011 or on the next occasion on which the contract or agreement is renewed or amended, whichever comes first.

(1) This assurance must commit the contractor to compliance with all applicable provisions of this Part in activities performed on behalf of the PVO.

(2) The assurance must also commit the contractor to implementing directives issued by your Complaints Resolution Officials (CROs) under § 39.103.

(c) As a PVO, you must also include such an assurance of compliance in your contracts or agreements of appointment with U.S. travel agents. With respect to contracts or agreements with U.S. travel agents existing on November 3, 2010, you must ensure the inclusion of this assurance by November 3, 2011 or on the next occasion on which the contract or agreement is renewed or amended, whichever comes first. You are not required to include such an assurance in contracts with foreign travel agents.

(d) You remain responsible for your contractors' and U.S. travel agents' compliance with this Part and with the assurances in your contracts with them.

(e) It is not a defense to an enforcement action under this Part that your noncompliance resulted from action or inaction by a contractor or U.S. travel agent.

§ 39.25 May PVOs refuse to provide transportation or use of a vessel on the basis of disability?

(a) As a PVO, you must not refuse to provide transportation or use of a vessel to a passenger with a disability on the basis of his or her disability, except as specifically permitted by this Part.

(b) You must not refuse to provide transportation or use of a vessel to a passenger with a disability because the person's disability results in appearance or involuntary behavior that may offend, annoy, or inconvenience crewmembers or other passengers.

(c) If you refuse to provide transportation or use of a vessel to a passenger on a basis relating to the individual's disability, you must provide to the person a written statement of the reason for the refusal. This statement must include the specific basis for your opinion that the refusal meets the standards of § 39.27 or is

otherwise specifically permitted by this part. You must provide this written statement to the person within 10 calendar days of the refusal of transportation or use of the vessel.

§ 39.27 Can a PVO take action to deny transportation or restrict services to a passenger with a disability based on safety concerns?

(a) As a PVO, you may take action to deny transportation or restrict services to a passenger with a disability if necessitated by legitimate safety requirements. Safety requirements must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

Example 1 to paragraph 39.27(a): You may take such action in order to comply with Coast Guard safety regulations.

Example 2 to paragraph 39.27(a): You may take such action if accommodating a large or heavy wheelchair would, together with its occupant, create weight and balance problem that could affect adversely the seaworthiness of the vessel or impede emergency egress from the vessel.

Example 3 to paragraph 39.27(a): You could restrict access to a lifeboat for a mobility device that would limit access to the lifeboat for other passengers.

(b) In taking action pursuant to legitimate safety requirements, you must take the action that imposes the minimum feasible burdens or limitations from the point of view of the passenger. For example, if you can meet legitimate safety requirements by a means short of refusing transportation to a passenger, you must do so.

(c) You may take action to deny transportation or restrict services to a passenger if the passenger poses a direct threat to others. In determining whether an individual poses a direct threat to the health or safety of others, the PVO must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: The nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.

§ 39.29 May PVOs limit the number of passengers with a disability on a passenger vessel?

As a PVO, you must not limit the number of passengers with a disability other than individuals with a mobility disability on your vessel. However, if in the Captain's judgment, weight or stability issues are presented by the presence of mobility devices and would conflict with legitimate safety requirements pertaining to the vessel and its passengers, then the number of passengers with mobility aids may be limited, but only to the extent reasonable to prevent a avoid such a conflict.

§ 39.31 May PVOs limit access to transportation or use of a vessel on the basis that a passenger has a communicable disease?

(a) You must not take any of the following actions on the basis that a passenger has a communicable disease or infection, unless one of the conditions of paragraph (b) of this section exists:

(1) Refuse to provide transportation or use of a vessel to the passenger;

(2) Delay the passenger's transportation or use of the vessel (*e.g.,* require the passenger to take a later trip);

(3) Impose on the passenger any condition, restriction, or requirement not imposed on other passengers; or

(4) Require the passenger to provide a medical certificate.

(b) You may take actions listed in paragraph (a) of this section only if either or both of the conditions listed in paragraphs (b)(1) and (2) of this section are met. The action you take must be the least restrictive from the point of view of the passenger, consistent with protecting the health of other passengers.

(1) U.S. or international public health authorities (*e.g.,* the Centers for Disease Control, Public Health Service, World Health Organization) have determined that persons with a particular condition should not be permitted to travel or should travel only under conditions specified by the public health authorities;

(2) An individual has a condition that is both readily transmissible by casual contact in the context of traveling on or using a passenger vessel and has serious health consequences.

Example 1 to paragraph 39.31(b)(2). A passenger has a common cold. This condition is readily transmissible by casual contact but does not have serious health consequences. You may not take any of the actions listed in paragraph (a) of this section.

Example 2 to paragraph 39.31(b)(2): A passenger has HIV/AIDS. This condition is not readily transmissible by casual contact but does have serious health consequences. You may not take any of the actions listed in paragraph (a) of this section.

Example 3 to paragraph 39.31(b)(2): A passenger has SARS or a norovirus. These conditions are readily transmissible by casual contact and have serious health consequences. You may take an action listed in paragraph (a) of this section.

Example 4 to paragraph 39.31(b)(2). A passenger has a condition that is not readily transmissible by casual contact to or does not have serious health consequences for the general passenger population. However, it is possible that it could be readily transmitted by casual contact with and have serious health consequences for an individual with a severe allergy or severely compromised immune system. You may not take any of the actions listed in paragraph (a) of this section.

(c) Any action of those listed in paragraph (a) of this section that you take under paragraph (b) of this section must be the least drastic action you can take to protect the health of other passengers. For example, if you can protect the health of other passenger by imposing a condition on the transportation of a passenger with a communicable disease (*e.g.,* limiting the passenger's access to certain facilities on the vessel for a period of time), you cannot totally deny transportation on the vessel.

(d) For purposes of paragraph (a)(4) of this section, a medical certificate is a written statement from the passenger's physician saying that the passenger's disease or infection would not, under the present conditions in the particular passenger's case, be readily communicable to other persons by casual contact during the normal course of the passenger's transportation or use of the vessel. Such a medical certificate must state any conditions or precautions that would have to be observed to prevent the transmission of the disease or infection to other persons in the normal course of the passenger's transportation on or use of the vessel. It must be sufficiently recent to pertain directly to the communicable disease presented by the passenger at the time the passenger seeks to board the vessel.

(e) If your action under this section results in the postponement of a passenger's transportation or use of the vessel, you must permit the passenger to travel or use the vessel at a later available time (up to one year from the date of the postponed trip or use of the vessel) at the cost that would have applied to the passenger's originally scheduled trip or use of the vessel without penalty or, at the passenger's discretion, provide a refund for any unused transportation or use of the vessel. If there is no available reservation within one year, you must provide a refund.

(f) If you take any action under this section that restricts a passenger's transportation or use of the vessel, you must, on the passenger's request, provide a written explanation within 10 days of the request.

§ 39.33 May PVOs require a passenger with a disability to provide a medical certificate?

Except as provided in § 39.31, you must not require a passenger with a disability to have a medical certificate as a condition for being provided transportation on your vessel.

§ 39.35 May PVOs require a passenger with a disability to provide advance notice that he or she is traveling on or using a passenger vessel when no particular services are sought?

As a PVO, you must not require a passenger with a disability to provide advance notice of the fact that he or she is traveling on or using a passenger vessel when the passenger is not seeking particular auxiliary aids or services, or special privileges or services, that in order to be provided need to be arranged before the passenger arrives to board the vessel. The PVO always has an obligation to provide effective communication between the PVO and individuals who are deaf or hard of hearing or blind or visually impaired through the use of appropriate auxiliary aids and services.

§ 39.37 May PVOs require a passenger with a disability to provide advance notice in order to obtain particular auxiliary aids and services or to arrange group travel?

(a) Except as provided in this section, as a PVO you must not require a passenger with a disability to provide advance notice in order to obtain services or privileges required by this Part.

(b) If 10 or more passengers with a disability seek to travel as a group, you may require 72 hours advance notice for the group's travel.

(c) With respect to providing particular auxiliary aids and services, you may request reasonable advance notice to guarantee the availability of those aids or services.

(d) Your reservation and other administrative systems must ensure that when passengers provide the advance notice that you require, consistent with this section, for services and privileges, the notice is communicated, clearly and on time, to the people responsible for providing the requested service or accommodation.

§ 39.39 How do PVOs ensure that passengers with disabilities are able to use accessible cabins?

(a) As a PVO operating a vessel that has accessible cabins, you must follow the requirements of this Part to ensure that passengers with disabilities who need accessible cabins have nondiscriminatory access to them.

(b) You must, with respect to reservations made by any means (*e.g.,* telephone, Internet, in person, or through a third party):

(1) Modify your policies, practices, or procedures to ensure that individuals with disabilities can make reservations for accessible cabins during the same hours and in the same manner as individuals who do not need accessible cabins;

(2) Identify and describe accessible features in the cabins offered through your reservations service in enough detail to permit individuals with disabilities to assess independently whether a given cabin meets his or her accessibility needs.

(3) Ensure that accessible cabins are held for use by individuals with disabilities until all other cabins in that class of service have been rented;

(4) Reserve accessible cabins upon request by a passenger with disabilities and ensure that the specific accessible cabin reserved by that passenger is held for him or her, even you do not normally hold specific cabins for passengers who make reservations.

(c) You may release unsold accessible cabins to persons without disabilities for their own use when all other cabins in the same class of service and price for a voyage have been reserved.

(d) If a passenger with a disability seeks to reserve an accessible cabin in a given class of service, and there is not an available accessible cabin in that class of service, but there is an available accessible cabin in a different class of service, you must allow the passenger to reserve that accessible cabin at the price of the requested class of service of the class of service in which the accessible cabin exists, whichever is lower.

(e) As a PVO, you are never required to deny transportation to any passenger who has already reserved passage in order to accommodate a passenger with a disability in an accessible cabin.

(f) You must not require proof of disability, including, for example, a doctor's note, before reserving an accessible cabin.

(g) To prevent fraud in the assignment of accessible cabins (*e.g.,* attempts by individuals who do not have disabilities to reserve accessible cabins because they have greater space, you—

(1) Must inquire of persons seeking to reserve such cabins whether the individual (or an individual for whom the cabin is being reserved) has a mobility disability or a disability that requires the use of the accessible features that are provided in the cabin.

(2) May require a written attestation from the individual that accessible cabin is for a person who has a mobility disability or a disability that requires the use of the accessible features that are provided in the cabin.

(h) You must investigate the potential misuse of accessible cabins where there is good cause to believe that such cabins have been purchased fraudulently, and you may take appropriate action against someone who has reserved or purchased such a cabin fraudulently. For example, if an individual who does not have a disability reserves an accessible cabin, after having attested that he or she has a mobility disability, you may deny transportation to the individual.

§ 39.41 May a passenger with a disability be required to travel with another person?

(a) You must not require that a passenger with a disability travel with another person as a condition of being provided transportation on or use of a passenger vessel.

(b) Your personnel are not required to perform personal tasks (*e.g.,* assisting with eating, dressing, toileting) for a passenger.

§ 39.43 May PVOs impose special charges on passengers with a disability for providing services required by this rule?

(a) As a PVO, you must not charge higher fares, surcharges, or other fees to passengers with a disability that are not imposed on other passengers for transportation or use of the vessel.

(b) If the accommodations on a vessel that are accessible to passengers with a disability are available only in a type or class of service or part of a vessel that are more expensive than the type or class of service or part of a vessel that the passenger requests, you must provide the accessible accommodation at the price of the type or class of service or facility that the passenger requests.

(c) You must not impose special or extra charges for providing facilities, equipment, or services that this rule requires to be provided to passengers with a disability.

§ 39.45 May PVOs impose other restrictions on passengers with a disability that they do not impose on other passengers?

(a) As a PVO, you must not subject passengers with a disability to restrictions that do not apply to other passengers, except as otherwise explicitly permitted in this Part.

(b) Restrictions you must not impose on passengers with a disability include, but are not limited to, the following:

(1) Restricting passengers' movement within the vessel or a terminal;

(2) Requiring passengers to remain in a holding area or other location in order to receive transportation or services;

(4) Requiring passengers to wear badges or other special identification; or

(5) Requiring ambulatory passengers, including but not limited to blind or visually impaired passengers, to use a wheelchair or other mobility device in order to receive assistance required by this Part or otherwise offered to the passenger.

(c) Special muster stations for disabled individuals are permissible for emergency evacuations in order to centrally locate available resources.

§ 39.47 May PVOs require passengers with a disability to sign waivers or releases?

(a) As a PVO, you must not require passengers with a disability to sign any release or waiver of liability not required of all passengers in order to receive transportation or use of a vessel or to receive services relating to a disability.

(b) You must not require passengers with a disability to sign waivers of liability for damage to or loss of wheelchairs or other mobility or assistive devices.

Subpart C—Information for Passengers

§ 39.51 What is the general requirement for PVOs' provision of auxiliary aids and services to passengers?

(a) If you are a PVO that is a public entity, you must furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program or activity. In determining what type of auxiliary aid or service is necessary, you must give primary consideration to the requests of individuals with disabilities.

(b) If you are a PVO that is a private entity, you must furnish appropriate auxiliary aids or services where necessary to ensure effective communication with individuals with disabilities.

(c) If a provision of a particular auxiliary aid or service would result in a fundamental alteration in the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or in an undue burden, you shall provide an alternative auxiliary aid or service, if one exists, that would not result in a fundamental alteration or undue burden but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the goods, services, facilities, privileges, advantages, or accommodations you offer.

(d) As a PVO, it is your responsibility, not that of a passenger with a disability, to provide needed auxiliary aids and services.

§ 39.53 What information must PVOs provide to passengers with a disability?

As a PVO, you must provide the following information to individuals who self-identify as having a disability (including those who are deaf or hard of hearing or who are blind or visually impaired) or who request disability-related information, or persons making inquiries on the behalf of such persons. The information you provide must, to the maximum extent feasible, be specific to the vessel a person is seeking to travel on or use.

(a) The availability of accessible facilities on the vessel including, but not limited to, means of boarding the vessel, toilet rooms, staterooms, decks, dining, and recreational facilities.

(b) Any limitations of the usability of the vessel or portions of the vessel by people with mobility impairments;

(c) Any limitations on the accessibility of boarding and disembarking at ports at which the vessel will call (*e.g.,* because of the use of inaccessible lighters or tenders as the means of coming to or from the vessel);

(d) Any limitations on the accessibility of services or tours ancillary to the transportation provided by the vessel concerning which the PVO makes arrangements available to passengers;

(e) Any limitations on the ability of a passenger to take a service animal off the vessel at foreign ports at which the vessel will call (*e.g.,* because of quarantine regulations) and provisions for the care of an animal acceptable to the PVO that the passenger must meet when the passenger disembarks at a port at which the animal must remain aboard the vessel.

(f) The services, including auxiliary aids and services, available to individuals who are deaf or hard of hearing or blind or visually impaired.

(g) Any limitations on the ability of the vessel to accommodate passengers with a disability.

(h) Any limitations on the accessibility of boarding and disembarking at ports at which the vessel will call and services or tours ancillary to the transportation provided by the vessel concerning which the PVO makes arrangements available to passengers.

§ 39.55 Must information and reservation services of PVOs be accessible to individuals with hearing or vision impairments?

This section applies to information and reservation services made available to persons in the United States.

(a) If, as a PVO, you provide telephone reservation or information service to the public, you must make this service available to individuals who are deaf or hard-of-hearing and who use a text telephone (TTY) or a TTY relay service (TRS).

(1) You must make service to TTY/TRS users available during the same hours as telephone service for the general public.

(2) Your response time to TTY/TRS calls must be equivalent to your response time for your telephone service to the general public.

(3) You must meet this requirement by [date one year from the effective date of this Part].

(b) If, as a PVO, you provide written (*i.e.,* hard copy) information to the public, you must ensure that this information is able to be communicated effectively, on request, to persons with vision impairments. You must provide this information in the same language(s) in which you make it available to the general public.

§ 39.57 Must PVOs make copies of this rule available to passengers?

As a PVO, you must keep a current copy of this Part on each vessel and each U.S. port or terminal you serve and make it available to passengers on request. If you are an entity that does not receive Federal financial assistance, you are not required to make this copy available in languages other than English. You must make it available in accessible formats on request, subject to the provisions of § 39.51(c).

Subpart D—Accessibility of Landside Facilities

§ 39.61 What requirements must PVOs meet concerning the accessibility of terminals and other landside facilities?

As a PVO, you must comply with the following requirements with respect to all terminal and other landside facilities you own, lease, or control in the United States (including its territories, possessions, and commonwealths):

(a) With respect to new facilities, you must do the following:

(1) You must ensure that terminal facilities are readily accessible to and usable by individuals with disabilities, including individuals who use wheeled mobility assistive devices. You are deemed to comply with this obligation if the facilities meet the requirements of 49 CFR 37.9, and the standards referenced in that section.

(2) You must ensure that there is an accessible route between the terminal or other passenger waiting area and the boarding ramp or device used for the vessel. An accessible route is one

meeting the requirements of the standards referenced in 49 CFR 37.9.

(b) When a facility is altered, the altered portion must meet the same standards that would apply to a new facility.

(c) With respect to an existing facility, your obligations are the following:

(1) If you are a public entity, you must ensure that your terminals and other landside facilities meet program accessibility requirements, consistent with Department of Justice requirements at 28 CFR 35.150.

(2) If you are a private entity, you are required to remove architectural barriers where doing so is readily achievable, *i.e.,* easily accomplishable and able to be carried out without much difficulty or expense, consistent with Department of Justice requirements at 28 CFR 36.304 or, if not readily achievable, ensure that your goods, services, facilities, privileges, advantages, or accommodations are available through alternative methods if those methods are readily achievable, consistent with Department of Justice regulations at 28 CFR 36.305.

(d) Where you share responsibility for ensuring accessibility of a facility with another entity, you and the other entity are jointly and severally responsible for meeting applicable accessibility requirements.

§ 39.63 What modifications and auxiliary aids and services are required at terminals and other landside facilities for individuals with hearing or vision impairments?

(a) As a PVO, you must ensure that the information you provide to the general public at terminals and other landside facilities is effectively communicated to individuals who are blind or who have impaired vision and deaf or hard-of-hearing individuals, through the use of auxiliary aids and services. To the extent that this information is not available to these individuals through accessible signage and/or verbal public address announcements or other means, your personnel must promptly provide the information to such individuals on their request, in languages (*e.g.,* English, Norwegian, Japanese) in which the information is provided to the general public.

(b) The types of information you must make available include, but are not limited to, information concerning ticketing, fares, schedules and delays, and the checking and claiming of luggage.

Subpart E—Accessibility of Vessels [Reserved]

Subpart F—Assistance and Services to Passengers With Disabilities

§ 39.81 What assistance must PVOs provide to passengers with a disability in getting to and from a passenger vessel?

(a) As a PVO, if you provide, contract for, or otherwise arrange for transportation to and from a passenger vessel in the U.S. (*e.g.,* a bus transfer from an airport to a vessel terminal), you must ensure that the transfer service is accessible to and usable by individuals with disabilities, as required by this Part.

(b) You must also provide assistance requested by or on behalf of a passenger with a disability in moving between the terminal entrance (or a vehicle drop-off point adjacent to the entrance) of a terminal in the U.S. and the place where people get on or off the passenger vessel. This requirement includes assistance in accessing key functional areas of the terminal, such as ticket counters and baggage checking/claim. It also includes a brief stop upon request at an accessible toilet room.

§ 39.83 What are PVOs' obligations for assisting passengers with a disability in getting on and off a passenger vessel?

(a) If a passenger with a disability can readily get on or off a passenger vessel without assistance, you are not required to provide such assistance to the passenger. You must not require such a passenger with a disability to accept assistance from you in getting on or off the vessel unless it is provided to all passengers as a matter of course.

(b) With respect to a passenger with a disability who is not able to get on or off a passenger vessel without assistance, you must promptly provide assistance that ensures that the passenger can get on or off the vessel.

(c) When you have to provide assistance to a passenger with a disability in getting on or off a passenger vessel, you may use any available means to which the passenger consents (*e.g.,* lifts, ramps, boarding chairs, assistance by vessel personnel).

§ 39.85 What services must PVOs provide to passengers with a disability on board a passenger vessel?

As a PVO, you must provide services on board the vessel as requested by or on behalf of passengers with a disability, or when offered by PVO personnel and accepted by passengers with a disability, as follows:

(a) Assistance in moving about the vessel, with respect to any physical barriers rendering an area not readily accessible and usable to the passenger.

(b) If food is provided to passengers on the vessel, assistance in preparation for eating, such as opening packages and identifying food;

(c) Effective communication with passengers who have vision impairments or who are deaf or hard-of-hearing, so that these passengers have timely access to information the PVO provides to other passengers (*e.g.,* weather, on-board services, delays).

§ 39.87 What services are PVOs not required to provide to passengers with a disability on board a passenger vessel?

As a PVO, you are not required to provide extensive special assistance to passengers with a disability. For purposes of this section, extensive special assistance includes the following activities:

(a) Assistance in actual eating;

(b) Assistance within a toilet room or assistance elsewhere on the vessel with elimination functions; and

(c) Provision of medical equipment or services, or personal devices, except to the extent provided to all passengers.

§ 39.89 What requirements apply to on-board safety briefings, information, and drills?

As a PVO, you must comply with the following requirements with respect to safety briefings, information, or drills provided to passengers:

(a) You must provide the briefings or other safety-related information through means that effectively communicate their content to persons with vision or hearing impairments, using auxiliary aids and services where necessary for effective communication. This includes providing written materials in alternative formats that persons with vision impairments can use.

(b) You must not require any passenger with a disability to demonstrate that he or she has listened to, read, or understood the information presented, except to the extent that you impose such a requirement on all passengers. You must not take any action adverse to a qualified individual with a disability on the basis that the person has not "accepted" the briefing.

(c) As a PVO, if you present on-board safety briefings to passengers on video screens, you must ensure that the safety-video presentation is accessible to passengers with impaired hearing (*e.g.,* through use of captioning or placement of a sign language interpreter in the video).

(d) You must provide whatever assistance is necessary to enable passengers with disabilities to

participate fully in safety or emergency evacuation drills provided to all passengers.

(e) You must maintain evacuation programs, information, and equipment in locations that passengers can readily access and use.

§ 39.91 Must PVOs permit passengers with a disability to travel with service animals?

(a) As a PVO, you must permit service animals to accompany passengers with a disability.

(b) You must permit the service animal to accompany the passenger in all locations that passengers can use on a vessel, including in lifeboats.

(c) You must permit the passenger accompanied by the service animal to bring aboard a reasonable quantity of food for the animal aboard the vessel at no additional charge. If your vessel provides overnight accommodations, you must also provide reasonable refrigeration space for the service animal food.

(d) You must accept the following as evidence that an animal is a service animal: Identification cards, other written documentation, presence of harnesses, tags, and/or the credible verbal assurances of a passenger with a disability using the animal.

(e) If the legal requirements of a foreign government (*e.g.,* quarantine regulations) do not permit a service animal to disembark at a foreign port, as a PVO you may require the animal to remain on board while its user leaves the vessel. You must work with the animal's user to ensure that the animal is properly cared for during the user's absence.

§ 39.93 What wheelchairs and other assistive devices may passengers with a disability bring onto a passenger vessel?

(a) As a PVO subject to Title III of the ADA, you must permit individuals with mobility disabilities to use wheelchairs and manually powered mobility aids, such as walkers, crutches, canes, braces, or other similar devices designed for use by individuals with mobility disabilities in any areas open to pedestrian use.

(b)(1) As A PVO subject to Title III of the ADA, you must make reasonable modifications in your policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with mobility disabilities, unless you can demonstrate that a device cannot be operated on board the vessel consistent with legitimate safety requirements you have established for the vessel.

(2) In determining whether a particular other power-driven mobility device can be allowed on a specific vessel as a reasonable modification under paragraph (b)(1) of this section, the PVO must consider:

(i) The type, size, weight, dimensions, and speed of the device;

(ii) The vessel's volume of pedestrian traffic (which may vary at different times of the day, week, month, or year);

(iii) The vessel's design and operational characteristics (*e.g.,* the size and balance requirements of the vessel, the density and placement of stationary devices, and the availability of storage for the device, if requested by the user);

(iv) Whether legitimate safety requirements can be established to permit the safe operation of a device in the specific vessel; and

(c)(1) As a PVO subject to Title III of the ADA, you must not ask an individual using a wheelchair or other power-driven mobility device questions about the nature and extent of the individual's disability.

(2) You may ask a person using an other power-driven mobility device to provide a credible assurance that the mobility device is required because of the person's disability. In response to this inquiry, you must accept the presentation of a valid, State-issued disability parking placard or card, or State-issued proof of disability as a credible assurance that the use of the other power-driven mobility device is for the individual's mobility disability. In lieu of a valid, State-issued disability parking placard or card, or State-issued proof of disability, a PVO shall accept as a credible assurance a verbal representation not contradicted by observable fact, that the other power-driven mobility device is being used for a mobility disability.

(d) As a PVO subject to Title II of the ADA, you must follow the requirements of paragraphs (a) through (c) of this section. In addition, any restriction you impose on the use of an other powered mobility device on your vessel must be limited to the minimum necessary to meet a legitimate safety requirement. For example, if a device can be accommodated in some spaces of the vessel but not others because of a legitimate safety requirement, you could not completely exclude the device from the vessel.

(e) As a PVO, you are not required to permit passengers with a disability to bring wheelchairs or other powered mobility devices into lifeboats or other survival craft, in the context of an emergency evacuation of the vessel.

§ 39.95 May PVOs limit their liability for loss of or damage to wheelchairs or other assistive devices?

Consistent with any applicable requirements of international law, you must not apply any liability limits with respect to loss of or damage to wheeled mobility assistive devices or other assistive devices. The criterion for calculating the compensation for a lost, damaged, or destroyed wheelchair or other assistive device is the original purchase price of the device.

Subpart G—Complaints and Enforcement Procedures

§ 39.101 What are the requirements for providing Complaints Resolution Officials?

(a) As a PVO, you must designate one or more Complaints Resolution Officials (CROs).

(b) You must make a CRO available for contact on each vessel and at each terminal that you serve. The CRO may be made available in person or via telephone, if at no cost to the passenger. If a telephone link to the CRO is used, TTY or TRS service must be available so that persons with hearing impairments may readily communicate with the CRO. You must make CRO service available in the language(s) in which you make your other services available to the general public.

(c) You must make passengers with a disability aware of the availability of a CRO and how to contact the CRO in the following circumstances:

(1) In any situation in which any person complains or raises a concern with your personnel about discrimination, policies, or services with respect to passengers with a disability, and your personnel do not immediately resolve the issue to the customer's satisfaction or provide a requested accommodation, your personnel must immediately inform the passenger of the right to contact a CRO and the location and/or phone number of the CRO available on the vessel or at the terminal. Your personnel must provide this information to the passenger in a format he or she can use.

(2) Your reservation agents, contractors, and Web sites must provide information equivalent to that required by paragraph (c)(1) of this section to passengers with a disability using those services.

(d) Each CRO must be thoroughly familiar with the requirements of this Part and the PVO's procedures with respect to passengers with a disability. The CRO is intended to be the PVO's "expert" in compliance with the requirements of this Part.

(e) You must ensure that each of your CROs has the authority to make

dispositive resolution of complaints on behalf of the PVO. This means that the CRO must have the power to overrule the decision of any other personnel, except that the CRO may not be given authority to countermand a decision of the master of a vessel with respect to safety matters.

§ 39.103 What actions do CROs take on complaints?

When a complaint is made directly to a CRO (*e.g.,* orally, by phone, TTY) the CRO must promptly take dispositive action as follows:

(a) If the complaint is made to a CRO before the action or proposed action of PVO personnel has resulted in a violation of a provision of this Part, the CRO must take, or direct other PVO personnel to take, whatever action is necessary to ensure compliance with this Part.

(b) If an alleged violation of a provision of this Part has already occurred, and the CRO agrees that a violation has occurred, the CRO must provide to the complainant a written statement setting forth a summary of the facts and what steps, if any, the PVO proposes to take in response to the violation.

(c) If the CRO determines that the PVO's action does not violate a provision of this Part, the CRO must provide to the complainant a written statement including a summary of the facts and the reasons, under this Part, for the determination.

(d) The statements required to be provided under this section must inform the complainant of his or her right to complain to the Department of Transportation and/or Department of Justice. The CRO must provide the statement in person to the complainant in person if possible; otherwise, it must be transmitted to the complainant within 10 calendar days of the complaint.

§ 39.105 How must PVOs respond to written complaints?

(a) As a PVO, you must respond to written complaints received by any means (*e.g.,* letter, fax, e-mail, electronic instant message) concerning matters covered by this Part.

(b) A passenger making a written complaint, must state whether he or she had contacted a CRO in the matter, provide the name of the CRO and the date of the contact, if available, and enclose any written response received from the CRO.

(c) As a PVO, you are not required to respond to a complaint from a passenger postmarked or transmitted more than 45 days after the date of the incident.

(d) As a PVO, you must make a dispositive written response to a written disability complaint within 30 days of its receipt. The response must specifically admit or deny that a violation of this part has occurred. The response must be effectively communicated to the recipient.

(1) If you admit that a violation has occurred, you must provide to the complainant a written statement setting forth a summary of the facts and the steps, if any, you will take in response to the violation.

(2) If you deny that a violation has occurred, your response must include a summary of the facts and your reasons, under this Part, for the determination.

(3) Your response must also inform the complainant of his or her right to pursue DOT or DOJ enforcement action under this part, as applicable. DOT has enforcement authority under Title II of the ADA for public entities and under section 504 of the Rehabilitation Act for entities that receive Federal financial assistance; DOJ has enforcement authority under Title III of the ADA for private entities.

§ 39.107 Where may persons obtain assistance with matters covered by this regulation?

A passenger, PVO, or any other person may obtain information, guidance, or other assistance concerning 49 CFR part 39 from then DOT Departmental Office of Civil Rights and/or DOT Office of General Counsel, 1200 New Jersey Avenue, SE., Washington, DC 20590.

§ 39.109 What enforcement actions may be taken under this Part?

(a) The Department of Transportation investigates complaints and conducts reviews or other inquiries into the compliance with this Part of PVOs that are Title II entities.

(b) As a PVO subject to Title II of the ADA, you must be prepared to provide to the Department of Transportation a written explanation of your action in any situation in which you exclude or restrict an individual with a disability or any mobility or other assistive device used by such an individual with respect to the use of your vessel.

(c) The Department of Transportation investigates complaints conducts compliance reviews or other inquiries into the compliance of this Part of PVOs, whether private or public entities, that receive Federal financial assistance from the Department, under section 504 of the Rehabilitation Act of 1973, as amended.

(d) The Department may refer any matter concerning the compliance of PVOs with this Part to the Department of Justice for enforcement action.

(e) The Department of Justice investigates complaints and conducts reviews or other inquiries into the compliance with this Part of PVOs that are Title III entities.

(f) The Department of Justice may file suit in Federal court against both Title II and Title III PVOs for violations of this part.

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